RECORD, CASE No. 14,780.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 866. ~~Sup~~ 207

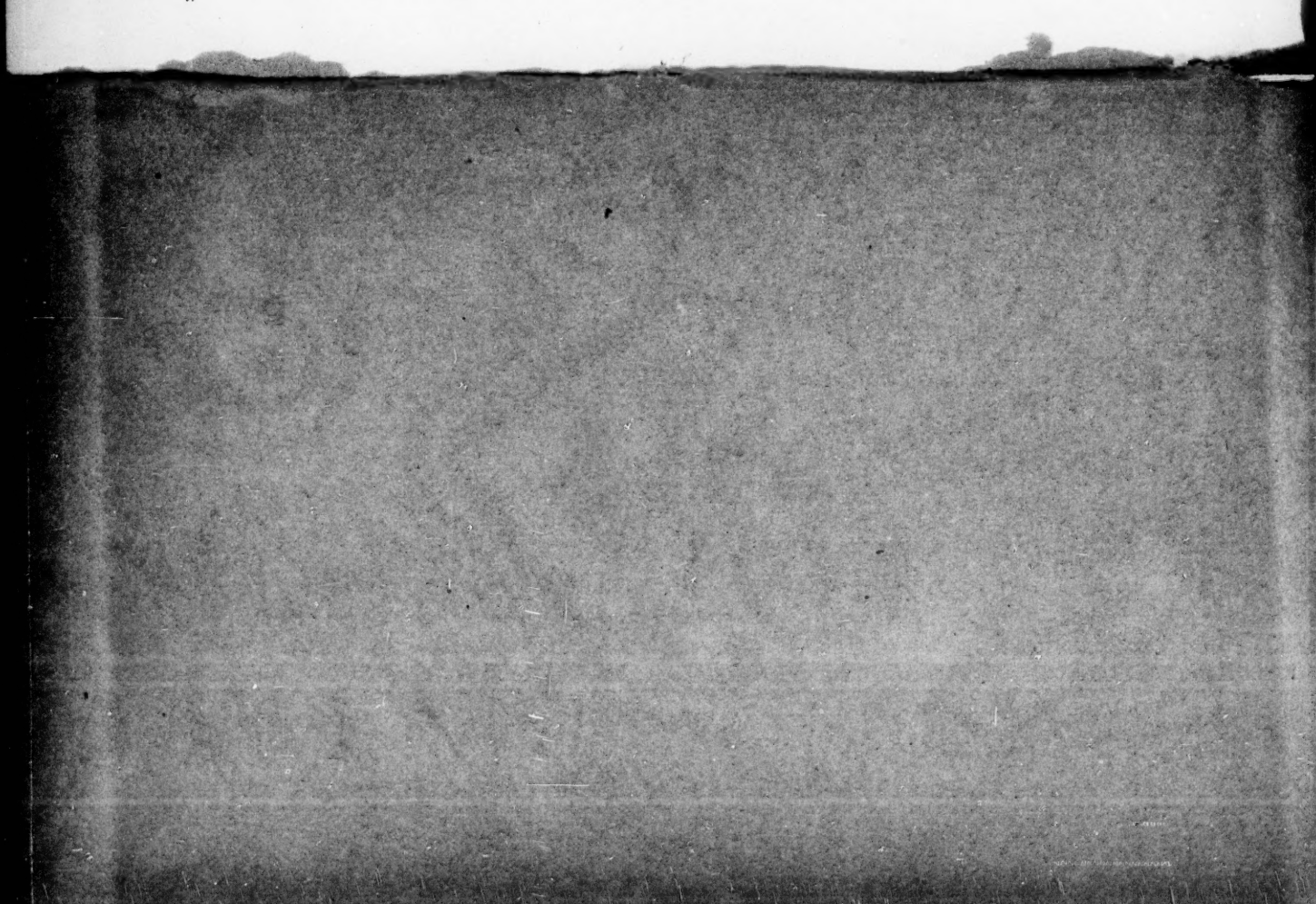
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. HARTER, AND LOUISE ODEAN, APPELLANTS,

vs.

JAMES P. TWOHIG.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JULY 27, 1891.



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1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of May, A. D. 1891.

Be it remembered that on the 10th day of April, 1889, a transcript was filed in the office of the clerk of said circuit court; which said transcript is in words and figures following, to wit:

Petition in the District Court.

In the District Court of Dakota County, in the State of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. HARTER, LOUISE HARTER, Intermarried with Albert L. Ordean, and Isaac Harter, Administrator of the Estate of Isaac Harter, Deceased, Defendants.

The plaintiff complains of the defendants, and for cause of action states to the court:

1. That Isaac Harter, deceased, departed this life intestate in the month of Feb., 1876, the exact date being unknown to this plaintiff; that the defendants, George Harter, Isaac Harter, M. D. Harter, Henry Harter, Louise Harter, intermarried with one Albert L. Ordean and now of that name, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, are the sole remaining children and the only legal heirs of the said Isaac Harter, deceased, and all of said heirs are over the age of 21 years.

2. That the said Isaac Harter, one of the above-named heirs of said Isaac Harter, deceased, was, by the probate court of Stark county, in the State of Ohio, duly appointed administrator of the estate of the said Isaac Harter, deceased, and letters of ad-
2 ministration in the estate of the said Isaac Harter were duly issued to him, and he thereupon duly qualified and entered on the duties as such administrator.

3. The plaintiff is the owner of the following-described real estate lying and being in the county of Dakota, in the State of Nebraska, to wit: The undivided one-half of the west half of the northeast quarter of section 33, township 29, in range 9 east.

4. Plaintiff alleges that on the 27th day of Feb., 1858, one Eugene L. Wilbur, who at said time was the owner of the west half of the northeast quarter of sec. 33, township 29, of range 9 east, executed and delivered to Isaac Harter, since deceased, his certain promissory note of that date, and thereby promised to pay Isaac Harter, 12 months after, the sum of $140, and if not paid when due the said note to bear interest, at the rate of 4 per cent. a month, until paid; and to secure the payment of the said note the said Eugene

L. Wilbur, on the same day, executed and delivered to one Augustus Kountze a trust deed of the said described lands.

5. That afterwards, to wit, on the 28th day of Feb., 1876, the said Isaac Harter filed his petition in the district court of Dakota county, praying a foreclosure of the said trust deed and making defendants in said action William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze, the trustee named in the said trust deed.

6. That at a term of the district court held in the said county on the 5th day of June, 1876, a decree was entered in the said case for the sum of $1,262.68, which amount included the sum of $14.68, costs, and the premises described in the said trust deed were ordered sold to satisfy the said amount.

7. That afterwards, on the 28th day of June, 1876, an order of sale was issued from the said court, directed to the sheriff of the said county and commanding him to sell the said described premises to satisfy the said judgment and the costs, and the said sheriff
3 did, on the 12th day of August, 1876, sell the said premises to the said Isaac Harter, deceased, for the sum of $1,200.

8. That afterwards, to wit, on the 10th day of May, 1877, the said sheriff made a deed of the said premises to the said Isaac Harter, deceased.

9. Plaintiff further states that on the 2nd day of March, 1860, Eugene L. Wilbur and his wife, the then owners of the said west half of the northeast quarter of sec. 33, township 29, of range 9 east, by quitclaim deed conveyed the said land to one William F. Lockwood; that the said deed was duly recorded in the office of the county clerk of Dakota county on the 3rd day of March, 1860.

10. That afterwards, to wit, on the 6th day of Feb., 1861, the said William F. Lockwood and wife by a warranty deed conveyed the said premises to one James W. Virtue; that the said deed was duly recorded in the office of the county clerk of Dakota county on the 22nd day of March, 1861; that afterwards, to wit, on the 3rd day of Feb., 1863, the said James W. Virtue by warranty deed conveyed an undivided one-half interest in the said land to Mary A. Lookwood.

That the said deed was duly recorded in the office of the county clerk of Dakota, in the State of Nebraska, on the 5th day of March, 1863.

11. That afterwards, on the 3rd day of September, 1888, the said James W. Virtue by a quitclaim deed conveyed to the plaintiff, James P. Twohig, the undivided one-half of the said described premises; that the said deed was duly recorded in the county clerk's office of Dakota county on the 22d day of Sept., 1888.

12. Plaintiff alleges that at the time of the filing of the petition for the foreclosure of the trust deed hereinbefore referred to James W. Virtue owned the undivided one-half interest in the said premises, and that he was the sole owner thereof from the 6th day of Feb., 1861, until the 3rd day of Sept., 1888, at which time all of his right, title, and interest in the said premises were assigned
4 by said hereof-described deed to this plaintiff, and the said

James W. Virtue was not made a party to said foreclosure proceedings, nor were his rights or his ownership in the said undivided one-half of the said premises in any manner cut off and barred by reason of the said proceedings nor in any other manner previous to or since the time said foreclosure proceedings were had, and that the said foreclosure proceedings in no manner affected his rights, the rights of this plaintiff, who holds under him, from redeeming said interest in the said premises from the lien of the said trust deed, if any such lien exists against the said premises by virtue of said deed.

13. Plaintiff further alleges that the said decree and the sale and the deed made under the said decree are void for the following reasons, to wit:

1. That service in the said case on the defendants, who were made parties in the said action, was had by publication, and the affidavits on which said publication is based was defective in that it does not set out and describe any cause of action sufficient to show that the plaintiff therein could proceed by publication of summons.

Said affidavit is not sworn to by the plaintiff nor by his att'y in the said case, but is sworn to by one Herman Kountze, who described himself as the agent of the plaintiff; all of which will be more fully shown by the copy of the said affidavit hereto attached, marked Exhibit "A" and made a part of this petition.

2. That the said petition filed in the said case does not state a cause of action against the defendant and in favor of the plaintiff therein.

3. The notice of publication is void in that it fa-lse to set out and describe the township in which the lands affected are situated, and also describes or sets out and refers to a trust deed—a mortgage—given on the 29th day of November, 1868, while the one set out and described in the petition and upon which the decree was made is dated Feb. 27th, 1858; all of which is more fully shown by the copy of the said notice and the petition, hereto attached and marked Exhibits "B" & "C."

4. For the further reason that the plaintiff in the said case died in the month of February, 1876, and long before the decree in the said case was made, and no revivor of the said proceedings were had before the rendition of the said decree, but the said case was prosecuted and said decree was rendered in the name of a dead person, and all proceedings thereafter had in the said case were in the name of Isaac Harter, deceased, and the said case was never revived, nor was there any attempt at revivor made in the said case at any time. The deed made by the sheriff of Dakota county was made to a dead person, and was made by the said sheriff without any order from the court confirming his proceedings in the sale of the said land and ordering a deed to be made to the purchaser.

14. Plaintiff further alleges that the said Isaac Harter did not before his death have either actual or constructive possession of the said premises, nor did any one acting for or through him have any such possession during that time, nor has the said d scribed premises since the death of the said Isaac Harter been in the actual or

the constructive possession of any one claiming under or through the said defendants, nor have said defendants or any — acting for them such possession at the present time.

15. Plaintiff alleges that the only right that the defendants have, if any, to the said undivided one-half of the premises set out and described in the said trust deed is a lien on the same for the one-half of the same, to wit, one-half of the $140 which said trust deed was given to secure, with legal interest thereon from the time the said sum become due and payable, and also for the half of the taxes paid on the entire tract described in the said trust deed, and interest thereon—on all sums paid previous to the 1st day of Sept., 1879, at the rate of 10 per cent. from the actual date of payment, and interest on all sums paid after said date at the rate of 7 per
6 cent. per annum from the several dates of payment; and the plaintiff offers to pay to the defendants the amount found due thereon, with interest thereon from the said several dates as aforesaid.

Wherefore the plaintiff prays judgment that the said decree and *and* the deed based thereon may be set aside and declared void and plaintiff be allowed to redeem the undivided ½ of said premises from the lien of the said trust deed on paying to the defendants the amount legally and equitably due them, and for such other and further relief as may be just and equitable.

JAMES P. TWOHIG,
By his att'y, W. E. GANT.
M'ELL C. JAY.

STATE OF NEBRASKA, } ss:
Dakota County, }

James P. Twohig, first duly sworn, on his oath deposes and says that he is the plaintiff in this action, that he has read the foregoing petition, and that the facts therein set forth are true, as he verily believes.

JAMES P. TWOHIG.

Subscribed and sworn to before me this 20th day of December, 1888.

MARCELL JAY,
Justice of the Peace.

Endorsed: State of Nebraska, Dakota county. Filed for record on the 21st day of Dec., A. D. 1888, at — o'clock — m., and recorded in Book —, on page —. J. P. Twohig, clerk.

EXHIBIT "A."

Copy of Affidavit.

THE STATE OF OHIO, } ss:
Stark County, }

Before me, the undersigned authority in and — said county and State, personally appeared Isaac Harter this 30th day of June, A. D.

1888, who, being first duly sworn, says on oath that Isaac Harter, late of Stark county, Ohio, the father of the affiant, departed this life on February, 1876 (1876), intestate, and leaving his
7 widow, A. Z. Harter, and the following heirs-at-law, who were at the time of the death of said Isaac Harter of full age and competant to act for themselves, viz., George D. Harter, intermarried with Elizabeth Aultman; M. D. Harter, intermarried with Mary Brown; Isaac Harter, since intermarried with Emma Roberts; Henry W. Harter, since intermarried with Annie H. Taylor; C. A. Harter, an unmarried woman, and Louise Harter, since intermarried with Albert L. Ordean.

And affiant further says that the above named are all the heirs of Isaac Harter, dec'd, and that they now are and have been ever since the decease of the said Isaac Harter competent to transact business.

And affiant further says that while he was appointed administrator of the — Isaac Harter, deceased, by the probate court of Stark county, Ohio, that said estate was not administered upon by him, but was settled by and between the said widow and heirs by amicable agreement out of court, and that he was appointed administrator solely to cancel mortgages and to transact other formal business; that said Isaac Harter at the time of his death left no debts of any consequence; that all of said debts have long since been paid and discharged, and that on first day of June, A. D. 1888, there existed no debts whatever against the estate of said Isaac Harter, deceased; and further this affiant saith not.

ISAAC HARTER.

Sworn to and subscribed in my presence by Isaac Harter the day and date above written.

[SEAL.] CHAS. KIRCHBAUM,
Notary Public in and for said Stark County, Ohio.

EXHIBIT B.

Copy Sheriff's Deed.

Nicholis Maher, sheriff, to Isaac Harter.

8 This indenture, made the tenth day of May in the year of our Lord one thousand eight hundred and seventy-seven, between Nicholas Maher, sheriff of Dakota county, Nebraska of the first part, and Isaac Harter of the second part.

Whereas, at a term of the district court of the sixth judicial district of the State of Nebraska, in and for Dakota county, held at the court-house in Dakota City in the said county on the fifth day of June in the year of our Lord one thousand eight hundred and seventy-six it was among other things ordered, adjudged and decreed by said court, in a certain cause depending in said court between Isaac Harter, plaintiff, and William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze, defendants, that the mortgaged premises mentioned and set forth in the pleadings in

said cause be sold by or under the direction of the said party of the first part at public auction in the county where the said premises directed to be sold are situated, the said sheriff first giving public notice of the time and place of said sale according to law, and the practice of the said court. And whereas, the said Nicholis Maher, sheriff as aforesaid and party of the first part to these presents in pursuant- of the order and decree of said court, did, on the twelfth day of Augustus, A. D. 1876, sell at public auction at the court-house in Dakota City, in said county and State, the mortgaged premises hereinafter particularly described having first given the previous notice of the time and place of said sale, with a brief description of said mortgaged premises as required by the order and decree aforesaid, at which sale the premises were struck off to Isaac Harter the said party of the second part to these presents for the sum of twelve hundred dollars that being the highest bidden therefor and being more than two-thirds of the appraised value thereof.

Now therefore, this indenture, witnesseth, that the said Nicholis Maher, sheriff as aforesaid, in order to carry out effect- the
9 said sale so made as aforesaid in pursuance of the said decree, and also by virtue of the statute in which case made and provided and in consideration of the premises and the sum of twelve hundred dollars paid by the said party of the second part to these presents, to the said Nicholis Maher, sheriff as aforesaid the receipt whereof he doth hereby confess and acknowledge and by these presents doth grant, bargain, and convey unto the said party of the second part and to his heirs and assigns forever all that certain piece or parcel of land to wit: The west one-half (½) of the northeast quarter of section thirty-three (33) township twenty-nine (29) range nine (9) east in Dakota county Nebraska, containing eighty acres together with all and singular the rights, titles, members, privileges, hereditaments, and appurtenances to the same belonging or in anywise appertaining, to have and hold said premises above described and hereby intended to be granted and conveyed, unto the said party of the second part, his heirs and assigns, to them and their own proper use and behalf forever.

In testimony whereof, the said party of the first part, has hereunto set his hand the day and year first above written.

NICHOLIS MAHER,
Sheriff Dakota County, Nebraska.

Signed and delivered in presence of—
W. C. McBEATH.

STATE OF NEBRASKA, }
County of Dakota, } ss:

On this tenth day of May, 1877, before me, the undersigned notary public within and for said county, personally appeared Nicholis Maher, sheriff, to me known to be the identical person described in and who executed this indenture, and acknowledged that he executed the same as his voluntary act and deed for the use and purpose herein mentioned.

In testimony whereof I have hereunto set my hand and seal, at Dakota City, Nebr., this 10th day of May, A. D. 1887.

[SEAL.] ISAAC POWERS, JR.,
Notary Public.

10 Filed for record June 1st, 1887, at 8 o'clock a. m.
W. C. McBEATH,
County Clerk.

EXHIBIT C.

Copy of the Notice.

To William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze:

Take notice that you have been sued by Isaac Harter in the district court of the State of Nebraska for the county of Dakota, and that you are required on the tenth day (10th) of April, 1876, to file your answer to this petition filed in the clerk'- office of the said county.

The object and prayer of the said petition is the foreclusure of a mortgage or a trust deed, made by Eugene L. Wilbur to said Kountz, a trustee, on the 29th day of Nov., 1868, conveying the west half of the northeast quarter of sect. 33, in the said county, to secure a note made by the said Wilbur to said Harter on the same day for one hundred and forty dollars, with interest from maturity until paid at four per cent. a month, and for a sale of the said mortgaged premises and for other relief.

ISAAC POWERS, JR,
Att'y for the Plaintiff.

March 3rd, 1876.

Filed for record on the 21 day of Dec., A. D. 1888, at 3 o'clock p. m, and recorded in Book No. 3, doc. K, on page 96, No. 283.
J. P. TWOHIG, *Clerk.*
LUE A. HORSH, *Dept.*

Affidavit for Publication.

In the District Court in the County of Dakota, in the State of Nebr.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY Harter, Louise Harter, Intermarried with Albert L. Or-
11 dean, and Isaac Harter, Administrator of the Estate of Isaac Harter, Deceased.

STATE OF NEBRASKA, } *ss:*
Dakota County, }

James P. Twohig, plaintiff in the above-entitled case, being first duly sworn, on his oath deposes and says that on the 21 day of Dec., 1888, he filed a petition in the district court of Dakota county, in

the State of Nebraska, against George D. Harter, M. D. Harter, Isaac Harter, Henry Harter, Louise Harter, intermarried with one Albert L. Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, the object and prayer of which are to declare void and to set aside a decree rendered in the district court of Dakota county on the 5th day of May, 1876, under which the following-described real estate was sold, to wit: The west ½ of the northeast quarter of section 33, in township 29, of range 9 east, in Dakota county, in the State of Nebraska, and to set aside and to declare void the sheriff's deed made to Isaac Harter, deceased, on the 10th day of May, 1877, to the undivided ½ of the said real estate before described, and that the said plaintiff be allowed to redeem the undivided ½ of the said premises from the lien of a certain trust deed, dated the 27th day of Feb., 1858, made by one Eugene L. Wilbur and wife to one Augustus Kountze on paying to the said plaintiffs, defendants, the amount legally and equitably due them.

Affiant further states that the said defendants are non-residents of the said State of Nebraska, and service of summons cannot be made on them or either of them in this State.

Wherefore the said plaintiff prays for service upon the said defendant- by publication dated this 27th day of Dec., 1888.

JAMES P. TWOHIG.

Subscribed and sworn to before me this 27th day of Dec., 1888.

MARCELL JAY,
Justice of the Peace.

Filed Dec. 27, 1888.

JAMES P. TWOHIG, *Clerk.*

12 *Petition.*

In the District Court of Dakota County, State of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. Harter, Louise Harter, Intermarried with Albert L. Ordean, and Isaac Harter, Administrator of the Estate of Isaac Harter, Deceased, Defendants.

Your petitioners, George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, defendants in the above-entitled action, respectfully represent to this honorable court that the above-entitled suit is of a civil nature, and that there is a controversy in this suit wholly between citizens of different States; that your said petitioners above-named at the time of commencement of this suit were and still are all citizens of the State of Ohio; that the said James P. Twohig, plaintiff, was at the commencement of this suit and still is a citizen of the State of Nebraska; that the matter in dispute exceeds, exclusive of interest and costs thereon,

the sum of the value of two thousand dollars; that your petitioners make and file herewith a bond, with good and sufficient sureties, for their entering into the circuit court of the United States for the district of Nebraska on the first day of its next session a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner- therefore pray that this honorable court accept this petition and said bond and order a transfer of said suit to said circuit court of the United States for the district of Nebraska.

13

GEORGE D. HARTER,
M. D. HARTER,
ISAAC HARTER,
HENRY W. HARTER,
LOUISE ORDEAN, &
ISAAC HARTER,
Administrator, Def'ts,
By J. H. & C. M. SWAN,
Att'y- for Def't-.

STATE OF IOWA, }
Woodbury County, } ss:

J. H. Swan, being duly sworn, deposes and say- that he is one of the attorneys for the defendant- in the above-entitled action: that he has read and knows the contents of the foregoing petition, and that the same is true, as he verily believes.

J. H. SWAN.

Subscribed and sworn to before me this 25th day of Jan., 1889.

CHAS. M. SWAN,
Notary Public in and for Woodbury County, Iowa.

Know all men by these presents that we, George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, and Louise Ordean and Isaac Harter, administrator of the estate of the — Isaac Harter, deceased, and Aug. F. Haase and Pius Neff, as sureties, are held and firmly bound unto James P. Twohig in the penal sum of five hundred dollars; for the payment whereof, well and truly to be made unto the said James P. Twohig, his heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, having petitioned the district court of Dakota county, State of Nebraska, for the removal of a certain cause therein pending, wherein James P. Twohig is plaintiff and George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, are defendants, to the circuit court of the United States in and for the district of Nebraska:

14 Now, if the said George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, your petitioners, shall enter in the circuit court of the United States for the district of Nebraska, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that — suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 31st day of January, A. D. 1889.

GEORGE D. HARTER,
M. D. HARTER,
ISAAC HARTER,
HENRY W. HARTER,
LOUISE ORDEAN, AND
ISAAC HARTER, *Administrator*,
Defendants.

J. H. & C. M. SWAN,
Att'ys for Def'ts.

AUG. T. HAASE.
PIUS NEFF.

STATE OF NEBRASKA, } ss:
County of Dakota, }

We, Aug. T. Haase — Pius Neff, of said county, the sureties in the foregoing bond, being each duly sworn, do depose and say that we each are residents of the State of Nebraska and a property-holder therein; that we are each worth the sum of one thousand dollars over and above all our debts and liabilities and exclusive of property by law exempt from execution; that we each have property in the State of Nebraska liable to execution in the value of more than one thousand dollars.

AUG. T. HAASE.
PIUS NEFF.

Subscribed in my presence by Aug. T. Haase and Pius Neff and by them sworn to before me this 1st day of February, A. D. 1889.

[SEAL.] JOHN T. SPENCER,
Notary Public.

Filed Feb. 1, 1889, at 1 p. m.

J. P. TWOHIG, *Clk.*

15 *Copy Notice.*

In the District Court of Dakota County, in the State of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY Harter, Louise Harter, Intermarried with one Albert L. Ordean, and Isaac Harter, Administrator of the Estate of Isaac Harter, Deceased, Defendants.

The above-named defendants will take notice that on the 21st day of December, 1888, James P. Twohigg, plaintiffs herein, filed his petition in the district court of Dakota county, Nebraska, against the said defendants, the object and prayer of which are to vacate and set aside a decree of the dist. court of Dakota county rendered in said court on the 5th day of June, 1876, under which said decree the following-described land was sold, to wit:

The west half (W. ½) of northeast quarter (N. E. ¼) of section thirty-three (33), township twenty-nine (29), range nine (9) east, and to set aside and declare void the sheriff's deed to the undivided one-half of said land, made by virtue of said sale of said land to Isaac Harter, dated May 10th, 1877, and that plaintiff be allowed to redeem the undivided one-half of said premises from the lien of a certain trust deed made by Eugene L. Wilbur and wife to one Augustus Kountze, dated Feb. 27, 1858, by plaintiff paying to defendants what is legally and equitably due them.

You are required to answer said petition on or before the 4th day of Feb., 1889.

Dated Dec. 28, 1888.

JAMES P. TWOHIG,
By his att'ys, JAY BROS. AND W. E. GANTT.

Copy Proof of Publication.

I, E. B. Wilbur, being duly sworn according to law, do say that I am one of the publishers of the North Nebraska Argus, a
16 weekly newspaper published in Dakota City, Dakota county, State of Nebraska, and having a circulation in said county and elsewhere, and that the notice hereunto attached has been published in said paper for 5 successive weeks, the last publication being on the 25 day of Jan'y, A. D. 1889.

E. B. WILBUR.

Sworn to and subscribed *to* before me this 4 day of Febr'y, A. D. 1889.

J. P. TWOHIG, *Clk*,
By SUE A. HIRSH, *Deputy*.

Printer's Fees.

5 insertions	$12 00
Affidavit	25
Total	$12 25

P'd by pl'ff.

STATE OF NEBRASKA, } ss:
Dakota County, }

I, J. P. Twohig, clerk of the district court in and for Dakota county, Nebraska, do hereby certify the within and foregoing is a true and correct transcript of the above-entitled cause.

Witness my hand and seal of said court this 8th day of April, 1889.

[SEAL.] J. P. TWOHIG, *Clerk.*

Journal Entry.

J. P. TWOHIG }
vs.
ISAAC HARTER. }

Now, at this time, came the defendant-, and, having on and before the time under which, by the law and practice of this court, they were required to answer or plead in said action, filed in this court a petition for removal of the said cause to the circuit court of the United States in and for the district of Nebraska, and, having filed with said petition a bond, with good and sufficient sureties, as required by statutes, and the court, having examined the same, finds that the said — petition are sufficient, and it is therefore ordered that
17 the said cause be removed to the circuit court of the United States — and for the district of Nebraska, and that this court proceed no further therein.

Tuesday, March 26, 1889.

Dakota City, Nebraska.

Upon the back of said transcript appear endorsements in words and figures following, to wit: No. 3, N. U. S. circuit court, district of Nebraska. James P. Twohig *vs.* George D. Harter *et al.* Transcript. Filed Apr. 10, 1889. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 3rd day of May, 1889, answer was filed in said case; which said answer is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. Harter, Louise Harter, Intermarried with Albert M. Ordean, *et al.*, Defendants.

Answer to Complainant's Bill.

The answer of Geo. D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louis- Ordean, Isaac Harter, administrator of the estate of Isaac Harter, deceased, defendants, to the bill of complaint of James P. Twohig.

1. These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exceptions which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants for answer say:

2. That thay deny that the plaintiff is the owner of the
18 undivided one-half of the west half of the northeast quarter of section thirty-three (33), township twenty-nine (29), in range nine (9) E., in the county of Dakota and State of Nebraska.

3. That these defendants admit that on or about the 27th day of February, 1858, Eugene L. Wilbur, who at said time was the owner of the said west half of the northeast quarter of section 33, township 29, range 9, executed and delivered to Isaac Harter his certain promissory note of that date, and thereby promised to pay to Isaac Harter in twelve months after the sum of one hundred and forty dollars ($140), with interest, as specified in said note, and that on the same day he executed and delivered to Augustus Kountze a trust deed upon the said lands to secure the payment of the said note.

These defendants also admit that on or about the 28th day of Feb., 1876, said Isaac Harter filed his petition in the district court of Dakota county praying to foreclose the said trust deed and making the defendants in said action William F. Lockwood and Mary A. Lookwood, his wife, and Augustus Kountze, trustee named in said deed; and at a term of the district court of the said county, on the 5th day of June, 1876, a decree was entered in said cause for $1,262.68, which amount included the sum of $14.68, costs, and that by the terms of the said decree the premises described in said trust deed were ordered sold to satisfy the said amount; and that afterwards, on the 28th day of June, 1876, an order of sale was issued in the said court, directed to the sheriff of said county, demanding him to sell the said described premises to satisfy the said judgment and costs, and the said sheriff did on the 2nd day of August, 1876, sell the said premises to Isaac Harter for the sum of $1,200, and that

afterwards and on the 10th day of May, 1877, said sheriff made a deed of the said premises to Isaac Harter.

4. The defendants further admit upon their information and belief that on the 2nd day of March, 1860, Eugene L. Wilbur made and executed a quitclaim deed of the said land to one William F. Lockwood, and the said deed was duly recorded in the office of the county clerk of Dakota county, Neb., on the 3rd day of March, 1860.

5. These defendants, further answering, saith that from an examination of the records of Dakota county, Neb., they are informed that there is recorded in said office a quitclaim deed purporting to have been executed by Eugene L. Wilbur and wife to William F. Lockwood for the said premises; that there is also shown upon the said county clerk's record a deed purporting to have been executed by William F. Lockwood and wife to James W. Virtue for said premises, and also a deed purporting to have been executed by James W. Virtue to Mary A. Lockwood for the undivided one-half of said premises, and upon or about the 22nd day of Sept., 1888, there was placed upon the records of the said county of Dakota a quitclaim deed purporting to have been executed by James W. Virtue and purporting to quitclaim and release to this complainant the undivided one-half of the said premises; but as to whether the said deeds were in fact so executed or were executed by the parties represented therein, or whether they were so executed by the said parties who were ever interested or had any title to the said premises, or whether in fact the said premises were conveyed thereby, or whether said James W. Virtue, at the time of the filing of the petition for foreclosure of the said trust deed herein and in said bill of complaint referred to, owned or pretended to own or claim any right, title, or interest in the said premises, these defendants have no knowledge, save as informed by the bill of complaint of said complainant, and asks the court to require of the said complainant to make such proof thereof as he may be advised is necessary and material therein.

6. The defendants, further answering, deny that the said decree of sale and deed are void for the reasons set forth in the bill of complaint or for any other reason, but that, on the contrary, these defendants allege that by virtue of said proceedings and deed therein set forth they became the owners and entitled to the said premises.

7. These defendants, further answering the said bill of complaint, say that on or about the 27th day of Feb., 1858, one Eugene L. Wilbur, who at that time was the owner of the said west half of the northeast quarter of sec. 33, t'w'p 29, R. 9 E., made and executed to Augustus Kountze a trust deed to the said described land to secure to Isaac Harter payment of the sum of $140 and interest, according to the terms of the said note, and that the said Eugene L. Wilbur failed and neglected to pay and discharge the said note or obligation, and that after making and executing the said note and trust deed as aforesaid the said Eugene L. Wilbur, long prior to the proceedings instituted for the foreclosure of said trust deed, aban-

doned the said premises and neglected to care for the same or to pay the taxes thereof or to protect the same from sale for taxes, and said Isaac Harter was, from on or about the year 1864, obliged to care for, protect, and pay the taxes upon the said premises; that on or about the 28th day of Feb., 1876, the said Isaac Harter commenced an action in the district court of Dakota county, State of Nebraska, in which said lands were situated, for the collection of the said note and the foreclosure of the said trust deed upon the said premises, and thereafter such proceedings were had in said district court that on the 5th day of June, 1876, the decree was entered and the same was ordered sold to satisfy said amount. Thereafter such proceedings were had under the order of the said court as that the sheriff of said county did, on the 2nd day of August, 1876, sell the said premises in the manner provided by law to said Isaac Harter for the sum of $1,200, and on the 10th day ——, 1877, the said sheriff made and executed a deed conveying the said premises to Isaac Harter, which deed so made, conveying said premises to Isaac Harter, was duly recorded in the county clerk's office of said
21 county of Dakota, Nebraska, on the 1st day of June, 1877, on page 539 of Book "K" of said records, and that by reason of the said facts above stated and the said proceedings and the said deed so made and recorded the said Isaac Harter became the owner and entitled to the full and exclusive use and ownership of the said premises.

8. These defendants, further answering, and for defense to the said complainant's bill, say that the cause of action therein stated did not accrue at any time within ten years next preceding the commencement of the plaintiff's action.

9. These defendants, for further defense to the said complainant's bill of complaint, say that in 1858, at the time the said trust deed was given uponthe said premises to secure the said sum of one hundred and forty dollars ($140) due to the said Isaac Harter, the said west half of the northeast quarter of sec. 33, two. 29, R. 9 E., was of small value and not worth more at that time than the said indebtedness which the said trust deed was given to secure; that from that time for more than twenty-seven years the said lands remained of small value and *was* not worth and of the value of the amount due thereon necessary to pay to redeem the same, and that since the year 1864 the said maker of the said mortgage and all of his assignees fully and totally abandoned the said lands and the title thereto, and have wholly failed to pay and discharge the taxes and other obligations upon the said premises, and since the year 1864 and up to the year 1888 made no claim, nor have they offered in any manner to care for or pay taxes upon the said lands, or redeem the same from said indebtedness or from said sale, or to have or exercise any care, custody, control, or claim upon the same in any manner whatever, and that during all of the said time said plaintiff and those under whom he claims title have stood by, made no claim, given no notice, or taken any measures claiming or showing that they intended to claim the said land or that they had any interest therein.

22 That during all of said time these defendants have had the care, custody, and possession of the same, and have paid the taxes each and every year thereon; that during all the said time and up to about the year 1887 the said premises continued to be of comparatively small value, and during all of said time these defendants continued to hold and care for and pay the taxes on the said land, that being the only compensation received or that they were enabled to obtain as payment of the debt owing thereon; and during all of said time the said parties from whom the plaintiff claims to have obtained a deed made no claim to any title or interest therein, but left the same wholly to those defendants and wholly abandoned the said premises and all claim thereto, and refused to care for and protect the same from sale, or to pay the taxes thereon, or have any further use or care in connection therewith; that during all of said time the said record title of the said premises was in these defendants and they were in the care, custody, and control of these defendants, who have since said time laid out and expended, in the payment of taxes upon the said land and the care and custody thereof, large amount of money and time; that by reason of said acts, omissions, silence, and gross laches — the said parties under whom the plaintiff claims title their claim to the said premises became stale, and they were barred and estopped from asserting the same or transferring any claim or interest therein, and this plaintiff is now barred or estopped from claiming any estate or interest in or to the said premises.

10. That during the last two years, by reason of the improvements made in the vicinity of said land, the same has become of great value, and this plaintiff, James P. Twohig, well knowing the recent rise in value of said land and well knowing that the said Eugene L. Wilbur, William F. Lockwood, Mary A. Lockwood, and James W. Virtue had long ago ceased to have any care of or to in any manner protect the same or to pay any taxes thereon and had

23 wholly abandoned the same to these defendants, and that these defendants had for the last twenty-four years cared for and protected the same and paid the taxes thereon, fraudulently contriving and conspiring how he might injure and defraud these defendants, fraudulently and wrongfully, as these defendants are informed and verily believes, obtained from the said James W. Virtue the quitclaim deed for a mere nominal consideration for the purpose of harassing and injuring these defendants and defrauding them of the said property, to which in justice and in good conscience they are fully entitled.

And these defendants are informed and fully believes that the said plaintiff has no other interest in said premises save what he may acquire hereafter in prosecuting this litigation, and that he wrongfully took and procured the said deed, purely as a speculation, in the unjust and wrongful intent to deprive these defendants thereof, and that by reason thereof and of the *good* laches of those from whom he received the same he is estopped and barred from prosecuting his claim thereto.

12. And these defendants deny all the said bill charged; without

this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is not true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with the reasonable costs and charges in this behalf most wrongfully sustained.

ISAAC HARTER,
J. H. & C. M. SWAN,
Solicitors for Def'ts.

J. H. SWAN, *Of Counsel.*

UNITED STATES OF AMERICA:

STATE OF OHIO, } *ss:*
Stark County, }

24 Isaac Harter, being duly sworn, does depose and say that he is the defendant named in the foregoing answer subscribed to by him; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he verily believes it to be true.

ISAAC HARTER.

Subscribed and sworn to before me this 29th day of April, 1889.
[SEAL.] J. J. WHITACRE,
Notary Public in and for the County of Stark & State of Ohio.

Upon the back of said answer appear endorsements in words and figures following, to wit: No. 3, N. In circuit court of the United States, district of Nebraska. James P. Twohig, pl'ff, ag'st George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Ordean, *et al.*, def'ts. Answer of def'ts. Filed May 3, 1889. Elmer D. Frank, clerk. J. H. & C. M. Swan, solicitors for def'ts.

Thereupon, afterwards, to wit, on the 23rd day of May, 1889, replication was filed in said case, which; said replication is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, LOUISE HARTER, Intermarried with Albert M. Ordean, *et al.*, Defendants.

Replication.

This repliant, saving and reserving to himself all manner of advantage of exception to the manifold insufficiencies of the said an-

swer, for replication thereunto saith that he will aver and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver *due* prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

W. E. GANTT,
C. J. WRIGHT, &
MELL JAY,
Pl'ff's Att'ys.

STATE OF NEBRASKA, }
County of Dakota, } *ss:*

I, James P. Twohig, being first duly sworn, depose and say that I am the plaintiff named in the foregoing replication; that I have read the same, and the matters and things therein set forth are true, as I verily believe.

JAMES P. TWOHIG.

Subscribed in my presence and sworn to before me this 21st day of May, 1889.

[SEAL.] E. B. WILBUR,
County Judge.

Upon the back of said replication appear endorsements in words and figures following, to wit: No. 3, N. James P. Twohig *vs.* Geo. D. Harter *et al.* Replication. Filed May 23, 1889. Elmer D. Frank, clerk. W. E. Gantt, C. L. Wright, & Mell Jay, pl'ff's att'ys.

Thereupon, afterwards, to wit, on the 25th and 30th days of October, 1889, depositions were received, filed, and opened by order of court November 27th, 1889, and are in words and figures following, to wit:

Deposition of Isaac Harter, Jr.

In the United States Circuit Court in and for the District of Nebraska.

JAMES P. TWOHIG, Plaintiff, }
vs. }
GEORGE D. HARTER *et al.*, Defendants. }

It is hereby agreed and stipulated by and between the parties hereto that the deposition of Isaac Harter, Jr., of Canton, Ohio, in the above-entitled cause may be taken before any notary public in and for Stark county, Ohio, in Canton, Ohio, on the interrogatories and cross-interrogatories hereto attached.

And said deposition when taken to be returned and filed in said cause, both parties waiving a commission or further notice, and said deposition when taken to be used in the trial of said cause on the part of the plaintiff, subject to all legal objections except to the manner of taking *it* the same under this agreement.

C. S. WRIGHT, GANTT & JAY,
Att'ys for Pl'ff.
J. H. & C. M. SWAN, *Att'ys for Def'ts.*

Interrogatories to be Propounded to Isaac Harter.

Int. 1. State your name, age, place of residence, and occupation, giving date of your birth, and how long have you resided at said place where you now reside.

Int. 2. State the name of your father, and if he is now deceased please state the date of his death, giving day, month, and year.

Int. 3. Please give the names of the heirs of your father, Isaac Harter.

Int. 4. Where did your father, Isaac Harter, live on the 27th day of February, 1858?

Int. 5. Was your father, Isaac Harter, the same Isaac Harter to whom, on or about the 27th day of February, 1858, one Eugene L. Wilbur gave his promissory note for the sum of $140.00, due twelve months after its date, and secured the same by a trust deed to Augustus Kountze on the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9) east, in Dakota county, Nebraska?

Int. 6. Was or was not your father, Isaac Harter, the same Isaac Harter to whom said land above described was struck off and
27 sold by the sheriff of Dakota county, Nebraska, on or about the 12th day of August, 1876, under an execution or order of sale issued from the district court of Dakota county, Nebraska, on a decree of foreclosure rendered in said court foreclosing said trust deed to secure said note.

Int. 7. Was or was not your father, Isaac Harter, the same Isaac Harter who was plaintiff in a suit brought in said district court of Dakota county, Nebraska, on or about Feb. 28th, 1876, to foreclose said mortgage given to secure said note?

Int. 8. Was or was not your father, Isaac Harter, the same Isaac Harter in whose name, on or about the 5th day of June, 1876, a decree of foreclosure was entered in said cause, brought to foreclose said mortgage, in the district court of Dakota county, Nebraska, in which cause Isaac Harter was plaintiff and W. Lockwood, Mary A. Lockwood, and Augustus Kanty were defendants?

Int. 9. Was said suit brought in your name or was said decree rendered in your name or was said property struck off and sold to you at said sheriff's sale?

Int. 10. If you say said suit was brought in your name or said decree rendered in your name or said land was struck off to you at said sale, please state how and by whose instructions and by what authority it was so done.

Int. 11. Was not the sheriff's deed for said land, made under said decree and sale on or about the 10th day of May, 1877, executed to your father, Isaac Harter?

Int. 12. The said sheriff's deed for said land on May 10th, 1877, was not made to you, was it? If you say it was, please explain how it came to be made to you and who did you instruct to so make the same?

Int. 13. Is or is it not the fact that you never knew anything about said suit, decree, sale, and deed until long after said sheriff's deed was made to your father, Isaac Harter?

28 Int. 14. You never instructed any one, did you, to commence any suit on said note and trust deed and never had any interest in said note?

Int. 15. If you say you had any interest in said note, state what the interest was and how you acquired it.

Int. 16. The said suit to foreclose said mortgage was brought by Isaac Powers, as attorney for Isaac Harter. Is it not a fact that said suit was instituted in the name of your father by said attorney in pursuance of the direction of your father in his lifetime and that you had nothing to do with the same?

Int. 17. Is or is it not the fact that you and the defendants in this action claim all the interests you have or claim to have in the land in suit solely as heirs-at-law of Isaac Harter, your father, under said sheriff's deed made to him under said decree of foreclosure before referred to?

Int. 18. Has any one of the defendants ever been in the actual possession of said land or in any way improved the same?

Int. 19. If you say that any of the defendants have ever been in the actual possession of said land, please state in detail what said acts of possession were—when said possession was taken. Describe minutely and fully what was done in reference to said possession or acts of possession and the date or dates thereof.

Int. 20. Did you not on or about the 10th day of March, 1880, file your affidavit in the office of the probate judge of Stark county, Ohio, duly verified before said probate judge, in which you state that your father, Isaac Harter, died on the 27th day of February, 1876?

Int. 21. Did you not on or about the 30th day of June, 1888, make an affidavit before Charles Krichbaum, a notary public of Stark county, Ohio, in which you stated that your father, Isaac Harter, died February 27th, 1876?

29 *Cross-Interrogatories to be Asked Isaac Harter, of Canton, Ohio.*

Interrogatory 1. Are you acquainted with the plaintiff, J. P. Twohig?

Interrogatory 2. Do you know whether he was the county clerk and clerk of the district court of Dakota county, Nebraska, on the 22nd day of ——, 1888?

Interrogatory 3. Have you had any correspondence with J. P. Twohig, plaintiff herein, in relation to the land in controversy in

this suit? If so, please state who began the correspondence, when it was commenced, and how long it continued.

Interrogatory 4. If you have the letter which you first received from said J. P. Twohig, will you please produce the same and have the same identified by the commissioner taking this deposition and attach it thereto, or allow the commissioner to copy the same and attach such copy and make the same part of your deposition?

Interrogatory 5. If you have not got such letter of J. P. Twohig, plaintiff, please state where said letter now is, whether it is in your possession or control.

Interrogatory 6. In case said letter is destroyed or beyond your possession or control please give the substance of such letter, giving the language as near as you can.

Interrogatory 7. Did you reply to said letter received from said J. P. Twohig? If so, please state whether your reply reached Twohig, the plaintiff, and if it did so reach said Twohig, please state the substance of your reply.

Interrogatory 8. Have you received any other letters from said J. P. Twohig referring to this land? If so, will you produce the same and have them identified by the commissioner and attached to your deposition as an exhibit, making them a part thereof, or allow the commissioner to copy the same and attach such copies, making the same a part of your deposition?

Interrogatory 9. If you have not got such letter of J. P. Twohig, plaintiff, please state where said letter now is; whether it is
30 — your possession or control.

Interrogatory 10. In case said letter is destroyed or beyond your control, please give the substance of such letters, giving the language as near as you can.

Interrogatory 11. You were asked in the 17th interrogatory whether you and the other defendants claim all your interests in the land in suit as the heirs-at-law of Isaac Harter under a sheriff's deed and a decree of foreclosure referred to in said interrogatories. If you and the other defendants have any other claim or claims to said land please state fully what they are.

Interrogatory 12. When did you first learn that there was any claim of title to the land which is in suit or any of it, other than the claim of you and your codefendants?

Interrogatory 13. Did either J. W. Virtue, Mary A. Lockwood, ever assert any claim or title to the land in suit or any of it since June 1, 1877?

Interrogatory 14. When did J. P. Twohig, plaintiff, first make any claim to said land?

Interrogatory 15. When the land in suit was sold in 1877, do you know at what sum it was appraised? If so, please state the amount of the appraisement.

Interrogatory 16. When said land was sold in 1877, do you know the sum at which it was sold? If so, you may state it.

Interrogatory 17. Have you the means of knowing whether the land in suit was worth more than $1,200 in 1877?

Interrogatory 18. State whether the said land was then worth more than $1,200.

Interrogatory 19. When was the deed to Isaac Harter placed on record?

Interrogatory 20. Since June 1, 1877, has either J. W. Virtue, Mary A. Lockwood, or William F. Lockwood ever been in possession of the land in suit, or any part of it, or have they or either of them ever asserted any claim of title since that time against
31 the title and claim of title made by you and your codefendants?

Interrogatory 21. Since June 1, 1877, have you and your codefendants openly, notoriously, exclusively, and adversely claimed title to the land in suit and openly, notoriously, exclusively, and adversely exercised possessory acts over the same? If so, please state what these acts were.

Interrogatory 22. Were ever J. W. Virtue, Mary A. Lockwood, or William F. Lockwood in the actual manual possession of the land in suit?

Interrogatory 23. Has the land in controversy become more valuable since 1877? If so, when did it become more valuable, what caused the increase in value, and how much more valuable has it become?

Interrogatory 24. Was it after the affidavit referred to in interrogatory 21 had been filed in the clerk's office, in Dakota county, Nebraska, that the first claim was made by the plaintiff to the land in controversy?

Interrogatory 25. When did you or your codefendants learn that it was claimed that there was a defect in the proceedings to foreclose the trust deed given by E. L. Wilbur to Augustus Kountze Nov. 27, 1858, and that the deed executed by the sheriff in pursuance of the decree of the court in said proceedings was claimed to be void?

Interrogatory 26. Had you known of such claim or defect would you have commenced proceedings or made some effort at once to correct the same?

Interrogatory 27. State any other matter or thing pertaining to this suit and concerning which you have not been asked and concerning which you have not testified as fully as though you had been interrogated thereon.

Interrogatory 28. State, if you know, who has paid the taxes upon this land since the giving of the trust deed to Augustus Kountze, Nov. 27, 1858. If so, will you state fully who has paid them for each year and when paid and the amount paid each year?

Interrogatory 29. State whether James W. Virtue, William
32 F. Lockwood, or Mary A. Lockwood or any other person for them have ever offered to refund or repay to you or to the person who paid the same any of the sums so paid for taxes on said lands.

Interrogatory 30. State whether the said parties or any one for them have offered to redeem the said land from the said trust deed to Augustus Kountze, or ever made any application to redeem from

the same or from the sale under execution issued upon the decree in foreclosure of said trust deed. If so, who was it and when was such application made and to whom?

Interrogatory 31. Was there ever anything paid by Eugene K. Wilbur, William F. Lockwood, Mary A Lockwood, James W. Virtue, of any one for them upon the note given by Eugene L. Wilbur to Isaac Harter, dated November 27, 1858, to secure which the trust deed made by Eugene L. Wilbur to Augustus Kountze upon the land in controversy was given, either as principal or interest, either before or after the proceedings in foreclosure of the said trust deed?

J. H. & C. M. SWAN,
Att'ys for Def'ts.

In the United States Circuit Court in and for the District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER *et al.*, Defendants.

Depositions of Isaac Harter, Jr., of Canton, Ohio, taken in an action pending in the United States circuit court in and for the district of Nebraska, wherein James P. Twohig is plaintiff and George D. Harter *et al.* are defendants, and for the plaintiff, at the office of Julius Whiting, Jr., in Canton, Ohio; deposition taken under an agreement of the counsel for plaintiffs and defendants hereto attached and upon the attached interrogateries and cross-interrogatories.

On the 1st day of October, 1889, at the place above set forth, personally appeared ISAAC HARTER, Jr., of the county of Stark,
33 and, being first duly sworn by me, as hereafter certified, I propounded to him the interrogatories attached to the commission under which this deposition is taken, taking down his answers thereto in their order, and to said interrogatories he deposes as follows:

First interrogatory. State your name, age, place of residence, and occupation. Give date of birth. How long have you resided at said place? Where do you now reside?

Answer to first interrogatory. Isaac Harter; Canton, Ohio; occupation, banker; born September 25th, 1848; resided in Canton forty-one years; reside at said place now.

Second interrogatory. State name of your father, and, if he is now deceased, state date of his death, giving day, month, and year.

Answer to second interrogatory. My father's name was Isaac Harter. I believe he died February 27th, 1876.

Third interrogatory. Please give names of heirs of your father, Isaac Harter.

Answer to third interrogatory. Amanda Z. Harter, widow; George D. Harter, Michael D. Harter, Isaac Harter, Henry W. Harter, Christine A. Harter, and Louise H. Ordean.

Fourth interrogatory. Where did your father, Isaac Harter, live on the 27th day of February, 1858?

Answer to fourth interrogatory. In Canton, Ohio.

Fifth interrogatory. Was your father, Isaac Harter, the same Isaac Harter to whom, on or about the 27th day of February, 1858,
34 one Eugene L. Wilbur gave his promissory note for the sum of one hundred and forty dollars, due twelve months after its date, and secured the same by a trust deed to Augustus Kountze on the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9) east, in Dakota county, Nebraska?

Answer to fifth interrogatory. My father was the Isaac Harter to whom Wilbur gave the note and trust deed on the land in question in 1858.

Sixth interrogatory. Was or was not your father the same Isaac Harter to whom said land above described was struck off and sold by the sheriff of Dakota county, Nebraska, on or about the 12th day of August, 1876, under an execution or order of sale issued from the district court of Dakota county, Nebraska, on a decree of foreclosure rendered in said court foreclosing said trust deed to secure said note?

Answer to sixth interrogatory. He was the same Isaac Harter.

Seventh interrogatory. Was or was not your father, Isaac Harter, the same Isaac Harter who was plaintiff in a suit brought in said district court of Dakota county, Nebraska, on or about February 28th, 1876, to foreclose said mortgage given to secure said note?

Answer to seventh interrogatory. He was.

Eighth interrogatory. Was or was not your father, Isaac Harter, the same Isaac Harter in whose name, on or about the 5th day of June, 1876, a decree of foreclosure was entered in said cause brought to foreclose said mortgage in the district court of Dakota county, Nebraska, in which cause Isaac Harter was plaintiff and W. Lockwood and Mary A. Lockwood and Augustus Kountze were defendants?

Answer to eighth interrogatory. He was the same Isaac Harter.

35 Ninth interrogatory. Was said suit brought in your name, or was said decree rendered in your name, or was said property struck off and sold to you at said sheriff's sale?

Answer to ninth interrogatory. The suit was not brought in my name, nor was the decree rendered in my name, nor was the property struck off or sold to me at said sheriff's sale, but to my father, Isaac Harter.

Tenth interrogatory. If you say said suit was brought in your name, or said decree rendered in your name, or said land struck off to you at said sale, please state how, and by whose instructions, and by what authority it was so done.

Answer to tenth interrogatory. Suit was not brought in my name; said decree was not rendered in my name, nor was said land struck off to me at said sale, but the land was struck off to my father, Isaac Harter.

Eleventh interrogatory. Was not the sheriff's deed for said land made under said decree and sale on or about May 10th, 1877, executed to your father, Isaac Harter?

Answer to eleventh interrogatory. It was.

Twelfth interrogatory. The said sheriff's deed for said land on May 10th, 1877, was not made to you, was it? If you say it was, please explain how it came to be made to you, and who did you instruct to so make the same?

Answer to twelfth interrogatory. It was not made to me, but to my father, Isaac Harter.

Thirteenth interrogatory. Is it or is it not the fact that you never knew anything about said suit, decree, sale, and deed until
36 long after said sheriff's deed was made to your father, Isaac Harter?

Answer to thirteenth interrogatory. I knew that my father had placed the trust deed in the hands of an attorney to foreclose. After my father's death—I cannot tell how soon after—the deed under the foreclosure proceedings, which my father had instituted, was received, and the deed was placed upon record June 1st, 1877. I supposed that the proceedings were regular, as my father had employed a lawyer, and as a result of the proceedings we received the deed, and I never knew or heard of any claim whatever against our title until the plaintiff herein wrote me, in the latter part of the year 1888, that he claimed to have a title to the land in question.

Fourteenth interrogatory. You never instructed any one, did you, to commence any suit on said note or trust deed and never had any interest in said note?

Answer to fourteenth interrogatory. I did not instruct any one to commence said suit, and had only such interest in the said note as I would have by reason of my relationship to my father.

Fifteenth interrogatory. If you say you had any interest in said note, state what the interest was and how you acquired it.

Answer to fifteenth interrogatory. My answer to the preceding question covers this ground.

Sixteenth interrogatory. The suit to foreclose said mortgage was brought by Isaac Powers, as attorney for Isaac Harter. Is it not a fact that said suit was instituted in the name of your father, by said attorney, in pursuance of the directions of your father in his lifetime, and that you had nothing to do with the same?

Answer to sixteenth interrogatory. The suit was begun by my father in his lifetime and in his name.

37 Seventeenth interrogatory. Is or is it not the fact that you and the defendants in this action claim all the interests you have or claim to have in the land in suit solely as the heirs-at-law of Isaac Harter, your father, under said sheriff's deed made to him under said decree of foreclosure before referred to?

Answer to seventeenth interrogatory. We do claim the land in suit as heirs-at-law of Isaac Harter and under said sheriff's deed, but that is not our sole claims to said land, as we claim it on other grounds. We claim we have paid the taxes on the land for more than ten years since the deed to my father was placed on record by

his heirs, and we therefore claim title by adverse possession. We further claim the land because both Virtue and Lockwood many years ago abandoned the land, and we have been paying the taxes by reason of that abandonment since 1862, to my own knowledge, for which we hold receipts for nearly every year.

Eighteenth interrogatory. Has any one of the defendants ever been in actual possession of said land or in any way improved the same?

Answer to eighteenth interrogatory. Neither of the defendants nor the plaintiffs nor *their* predecessors have been in the actual manual possession of the land, as the land is unimproved land, and the only acts of possession exercised on the land since 1862 have been acts done by my father and his heirs, such as the payment of taxes, the open claim of ownership, and the open attempts to sell the land by us since the death of my father.

Nineteenth interrogatory. If you say that any of the defendants have ever been in actual posssession of the land, please state in detail what said acts of possession were, when said possession
38 was taken. Describe minutely and fully what was done in reference to said possession or acts of possession and the date or dates thereof.

Answer to nineteenth interrogator*ies*. I think the preceding answer covers this question.

Twentieth interrogatory. Did you not on or about the 10th day of March, 1880, file your affidavit in the office of the probate judge of Stark county, Ohio, duly verified before said probate judge, in which you state your father, Isaac Harter, died on the 27th day of February, 1876?

Answer to twentieth interrogatory. I have no recollection of the circumstances, but think it likely I may have done so.

Twenty-first interrogatory. Did you not, on or about the 30th day of June, 1888, make an affidavit before Charles Krichbaum, a notary public of Stark county, Ohio, in which you stated that your father, Isaac Harter, died February 27th, 1876?

Answer to twenty-first interrogatory. I believe I did.

And immediately thereafter, at the same time and place, I propounded to him the cross-interrogatories hereto attached, taking down his answers thereto in their order, which were as follows:

First cross-interrogatory. Are you acquainted with the plaintiff, J. P. Twohig?

Answer to first cross-interrogatory. I do not know him personally.

Second cross-interrogatory. Do you know whether he was the county clerk and clerk of the district court of Dakota county, Nebraska, on the 22 day of ——, 1888?
39 Answer to second cross-interrogatory. I think J. P. Twohig was clerk of the district court of Dakota county, Nebraska, on December 22d, 1888, because I received a letter signed J. P. Twohig, dated December 22d, 1888, on the printed letter-head of the clerk of that court.

Third cross-interrogatory. Have you had any correspondence with J. P. Twohig, plaintiff herein, in relation to the land in controversy in this suit? If so, please state who began the correspondence, when it was commenced, and how long it was continued.

Answer to third cross-interrogatory. I have. Twohig began the correspondence. It was some time in December, 1888. It continued about ten days or two weeks, and consisted of two letters written by Twohig and one by me.

Fourth cross-interrogatory. If you have the letter which you first received from said J. P. Twohig will you produce the same and have the same identified by the commissioner taking this deposition and attach it thereto, or allow the commissioner to copy the same and attach such copy and make the same part of your deposition.

Answer to fourth cross-interrogatory. The letter is not in my possession or control and I have looked high and low for it. My impression is that it was lost or destroyed.

Fifth cross-interrogatory. If you have not got such letter, please state where said letter now is; whether it is now in your possession or control.

Answer to fifth cross-interrogatory. I do not know where it is.

Sixth cross-interrogatory. In case said — is destroyed or beyond your possession or control, please give the substance of such letter, giving the language as near as you can.

40 Answer to sixth cross-interrogatory. I cannot give the exact language and would not pretend to, but can give the substance, which was as follows: Twohig wrote me, saying, I have come into possession of the bottom title to the land now in controversy. I cannot tell exactly how he described it, but it was the land in question in this suit. Twohig further wrote in that letter that I had better settle before he commenced suit for possession of the land. He also enclosed me an affidavit and asked if I had made it.

Seventh cross-interrogatory. Did you reply to said letter received from said J. P. Twohig? If so, please state whether your reply reached Twohig, the plaintiff, and if it did so reach said Twohig, please state the substance of your reply.

Answer to seventh cross-interrogatory. I did reply to Twohig, and the letter reached him, because he answered my letter. The substance of my letter was that we believed we had the best and only title to the land in controversy, and that before we would enter into any negotiations for settlement we would like to know the nature of his claim. I also returned to him the affidavit he had sent me.

Eighth cross-interrogatory. Have you received any other letters from J. P. Twohig concerning this land? If so, will you produce the same and have them identified by the commissioner and attached to your deposition as an exhibit, making them part thereof, or allow the commissioner to copy the same and attach such copy, making the same part of your deposition?

Answer to eighth cross-interrogatory. I have. I have received the second of the leters referred to above, which I hand to the com-

missioner to take a copy of the same and to mark the coty Exhibit "A," and to attach it to this my deposition and make it a part of the same.

(Witness here handed the commissioner a letter, a true copy,
41 of which, duly taken by the commssioner is hereto attached, marked Exhibit "A," and made part of this deposition.)

Ninth cross-interrogatory. If you have not got such letter of J. P. Twohig, plaintiff, please state where the letter now is; whether it is now in your possession or control.

Answer to ninth cross-interrogatory. I have the letter, as shown by my previous answer.

Tenth cross-interrogatory. In case said letter is destroyed or beyond your control, please give the substance of such letter, giving the language as near as you can.

Answer to tenth cross-interrogatory. I have produced the letter itself, which is made a part of this deposition by filing a copy.

Eleventh cross-interrogatory. You were asked in the 17th interrogatory whether you and the other defendants claim all your interests in the land in suit as the heirs-at-law of Isaac Harter under the sheriff's deed and the decree of foreclosure referred to in said interrogatories. If you and the other defendants have any other claim or claims to the said land, please state fully what they are.

Answer to eleventh cross-interrogatory. In addition to the claim of title under the sheriff's deed and decree of foreclosure referred to, we claim that J. W. Virtue and Mary A. Lockwood abandoned the land as long ago as 1862, and that since then the only possessory acts exercised upon the land were by my father in his lifetime and his heirs since. These consisted in the payment of taxes by my father since 1862 to the time of his death and by his heirs after his death. Our next claim is that since June 1st, 1877, when the sheriff's deed was put upon record, that we, the heirs of
Isaac Harter, have continually paid the taxes and have since
42 that date openly, notoriously, exclusively, and adversely claimed title to the land in suit, and never since that time was our claim in any way controverted or questioned until the plaintiff wrote me in December, 1888.

Twelfth cross-interrogatory. When did you first learn there was any claim of title to the land which is in suit or any of it other than the claim of you and your codefendants?

Answer to — cross-interrogatory. When Twohig wrote me in December, 1888.

Thirteenth cross-interrogatory. Did either J. W. Virtue or Mary A. Lockwood ever assert any claim or title to the land in suit or any of it since June 1st, 1877?

Answer to — cross-interrogatory. No; neither of them asserted any claim since June 1st, 1877, nor, indeed, 1862.

Fourteenth cross-interrogatory. When did J. P. Twohig first make any claim to said land?

Answer to fourteenth cross-interrogatory. Some time in December, 1888.

Fifteenth — interrogatory. When the land in suit was sold in 1877 do you know at what sum it was appraised? If so, please state the amount of the appraisement.

Answer to fifteenth cross-interrogatory. I have recently learned that it was appraised at eight hundred and eighty dollars ($880.00).

Sixteenth cross-interrogatory. When said land was sold in 1877 do you know the sum at which it was sold? If so, you may state it.

Answer to 16th cross-interrogatory. Yes; I do. It was sold for twelve hundred dollars ($1,200).

43 Seventeenth cross-interrogatory. Have you any means of knowing whether the land in suit was worth more than twelve hundred dollars in 1877?

Answer to 17th cross-interrogatory. I have.

Eighteenth cross-interrogatory. State whether the said land was then worth more than twelve hundred dollars ($1,200.00).

Answer to eighteenth — interrogatory. In my judgment, it was not. Had it been worth more than that we would not have owned it, but it was bid in simply to cover our claim and costs, as I understand it. I know we have never been able to sell the land for as much as sixteen hundred dollars ($1,600.00) between 1887 and the time the Sioux City bridge was built.

At this point the further taking of this deposition was adjourned till October 2nd, 1889, at 2 o'clock p. m.

On Wednesday, Oct. 2, at 2 o'clock p. m., the further taking of the deposition of Isaac Harter was resumed pursuant to adjournment.

19th cross-interrogatory. When was the deed to Isaac Harter placed on record?

Answer to 19th cross-interrogatory. On June first, 1877.

20 cross-interrogatory. Since June 1st, 1877, has either J. W. Virtue, Mary A. Lockwood, or William F. Lockwood ever been in possession of the land in suit or any part of it, or have they or either of them ever asserted any claim of title since that time against the title and claim of title made by you and your codefendants?

Answer to 20th cross-interrogatory. Neither of the parties mentioned have been in possession of the land in suit or any part of it since June 1st, 1877, nor have they or either of them ever asserted any claim against the land since that time or, indeed, since 1862; nor have they in any way asserted any claim of title since 1862.

44 21st cross-interrogatory. Since June 1st, 1877, have you and your codefendants openly, notoriously, exclusively, and adversely claimed title to the land in suit, and openly, notoriously, exclusively, and adversely exercised possessory acts over the same? If so, please state what these acts are.

Answer to 21st cross-interrogatory. We have so claimed title to the land in suit, as was shown by our putting the sheriff's deed on record June 1st, 1877, and have openly, notoriously, exclusively, and adversely since June 1st, 1877, exercised possessory acts such

as the payment of all taxes thereon, and made repeated efforts to sell the land, of which we claimed all this time to be the owners. We tried at different times since June 1st, 1877, to sell the land to various parties in Dakota county, Nebraska, and have during that time had various parties from Dakota county, Nebraska, write us of their own motion about it.

22d cross-interrogatory. Were ever J. W. Virtue, Mary A. Lockwood, or William E. Lockwood in the actua manual possession of the land in suit?

Answer to 22d cross-interrogatory. I do not believe they ever were in the actual possession of the land in suit, as it is unimproved land and has never been fenced. I feel quite sure that neither of the said parties have had actual manual possession of the land since 1862.

23rd cross-interrogatory. Has the land in controversy become more valuable since 1877; if so, when did it become more valuable? What caused the increase in value, and how much more valuable has it become?

Answer to 23d cross-interrogatory. It has. For several years after 1877 there was no material increase in the value of the land. After the bridge connecting Sioux City, Iowa, with the Nebraska shore was built people began to make inquiry about the land—people from Dakota county, Nebraska. Prior to that time we never had an offer of more than sixteen hundred dollars for the land. Within two or three years the land is said to have increased in value rapidly and is now said to be worth about two hundred dollars per acre. It was the building of the bridge that made the land more valuable.

24th cross-interrogatory. Was it after the affidavit referred to in interrogatory 21 had been filed in the clerk's office in Dakota county, Nebraska, that the first claim was made by the plaintiff to the land in controversy?

Answer to 24th cross-interrogatory. We sold some other land in Dakota county, Nebraska, and I filed the affidavit referred to to show, among other things, that my father's estate owed no debts at that time—in 1888—so that the purchaser would be satisfied that he was getting a good title. I am sure that it was filed some time before the plaintiff made any claim against the land in controversy, because he enclo-ed the affidavit in the first letter he ever wrote me, and when I answered the letter I returned the affidavit to him.

25th cross-interrogatory. When did you and your codefendants learn that it was claimed that there was a defect in the proceedings to foreclose*d* the trust deed given by E. L. Wilbur to Augustus Kountze Nov. 27, 1858, and that the deed executed by the sheriff in pursuance of the decree of the court in said proceedings was claimed to be void?

Answer to 25th cross-interrogatory. We first learned that from a copy of the petition which Twohig filed in Dakota county, Nebraska, against us and to which he swore, as the copy shows, on the 20th day of December, 1888.

26th cross-interrogatory. Had you known of such claim or defect

would you have commenced proceedings or made some effort at once to correct the same?

46 Answer to 26th cross-interrogatory. We should certainly have dome so at once.

27th cross-interrogatory. State any other matter or thing pertaining to this suit and concerning which you have not been asked and concerning which you have not testified as fully as though you had been interrogated thereon.

Answer to 27th cross-interrogatory. I do not think of anything not embraced in the questions.

28th cross-interrogatory. State if you know who has paid the taxes upon this land since the giving of the trust deed to Augustus Kountze, Nov. 27, 1858. If so, will you state fully who has paid them for each year and when paid and the amount paid each year?

Answer to 28th cross-interrogatory. I do not know whether my father paid the taxes before 1862, but I find that on February 3rd, 1863, my father paid the taxes on this land for the year 1862; on December 28th, 1863, he paid the taxes for 1863; on February —, 1865, he paid taxes for 1864. I cannot give the date when 1865 and 1866 were paid. December 2d, 1867, paid taxes for 1867; on February 19th, 1869, he paid taxes for 1868; on April 12th, 1870, he paid taxes for 1869; on March 20th, 1871, he paid the taxes for 1870; on January 10th, 1872, he paid the taxes for 1871; February 10th, 1873, he paid the taxes for 1872; on January 21, 1874, he paid the taxes for 1873; on April 28th, 1875, for 1874; on April 22d, 1876, for 1875. All but the last were paid by my father. The taxes from and including those paid April 22d, 1876, were paid by the heirs of my father, Isaac Harter. These taxes were paid as follows:

April 26th, 1877, for 1876.
March 11st, 1878, for 1877.
March 20th, 1879, for 1878.
March 10th, 1880, for 1879.
January 20th, 1881, for 1880, $22.54.
47 February 4th, 1882, for 1881, 15.05.
January 2d, 1883, for 1882, 16.02.
January 12th, 1884, for 1883, 18.95.
December 30th, 1884, for 1884, 29.12.
December 19th, 1885, for 1885, 13.10.
December 18th, 1886, for 1886, 20.00.
January —, 1888, for 1887, 76 00.
January 12th, 1889, for 1888, 53.00.

Prior to January 20th, 1881, when the taxes were paid for the year 1880, I cannot give the exact amount of taxes paid on the land in suit, and you will have to look at the records of Dakota county, Nebraska, to determine that. The reason I cannot give the exact amounts prior to that is because we paid the taxes on two tracts of land in Dakota county, Nebraska, and the amounts are not separated in the tax receipts.

29th cross-interrogatory. State whether James W. Virtue, William F. Lockwood, or Mary A. Lockwood or any other person for them

have ever offered to refund or repay to you or to the person who paid the same any of the sums so paid for taxes on said land.

Answer to 29th cross-interrogatory. Neither of the said parties or any one for them ever offered to redeem the land from the said trust deed, nor did either of said parties or any one for them make any offer at any time to redeem the same from the sale under the decree of foreclosure. I know that no such application or offer was ever made to any of the heirs of Isaac Harter, deceased. Said parties never offered to pay back or refund the taxes; neither did any one for them offer to repay us or refund the taxes nor any sums paid by us. They had utterly abandoned the land, and I do not find a word of correspondence among my father's papers from any of these parties or from any one making such an offer.

48 30th cross-interrogatory. State whether the said parties or any one for them have offered to redeem the said land from the trust deed to Augustus Kountze or ever made any application to redeem from the same or from the sale under execution issued upon the decree in foreclosure of said trust deed. If so, who was it and when was such application made and to whom?

Answer to 30th cross-interrogatory. Neither of the said parties nor any one for them have ever offered to redeem the land from the decree of foreclosure. I have covered the ground in my answer to the last question but one.

31st cross-interrogatory. Was there ever anything paid by Eugene L. Wilbur, William F. Lockwood, Mary A. Lockwood, James W. Virtue, or any one for them upon the note given by Eugene L. Wilbur to Isaac Harter, dated Nov. 27th, 1858, to secure which the trust deed made by Eugene L. Wilbur to Augustus Kountze upon the land in controversy was given, either as principal or interest, either before or after the proceedings in foreclosure of the said trust deed?

Answer to 31st cross-interrogatory. No payment was ever made upon either principal or interest by either of the said named persons or their representatives or from any one else, either before or after the decree in foreclosure.

ISAAC HARTER, JR.

THE STATE OF OHIO, }
County of Stark, } *ss*:

I, Julius Whiting, Jr., a notary public within and for the county of Stark and State of Ohio, do hereby certify that the above-named Isaac Harter, Jr., was by me first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition by him subscribed was taken down and reduced to writing by me and was subscribed in my presence, and that said deposition was

49 taken in the city of Canton, in said county and State, at the time therein set forth. I further certify that I am not of counsel in said action for either party thereto, and that I have no interest, direct or indirect, in the issues joined.

In testimony whereof I hereunto set my hand and official seal this 4th day of October, A. D. 1889.

JULIUS WHITING, JR.,
Notary Public within and for Stark County, O. [SEAL.]

Charges.

Taking deposition	$17 50
Swearing witness	60
Certificate	25
	$17 35

I hereby certify that the above charges were paid by the plaintiff.

J. WHITING, JR.

Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 3, N. Rec'd & filed Oct. 25, '89, & opened by order of court Nov. 27, 1889. E. D. Frank, clerk.

Stipulation and Testimony.

Stipulation.

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Pl'ff,
vs.
ISAAC HARTER, GEO. D. HARTER, *et al.*, Def'ts.

It is hereby stipulated and agreed by and between the parties plaintiff and defendant:

1st. That Isaac Harter, father of the defendants and plaintiff in the action of foreclosure commenced and prosecuted in the district court of Dakota county, Nebraska, and in whose name said decree was rendered and in whose name the sheriff's deed under said foreclosure suit was made, died Feb. 27, 1876, and that the plaintiff's bill of complaint in this cause may be and is amended so as to so state.

50 2nd. That the following conveyances were made, executed, and delivered by the respective parties thereto at the dates stated in plaintiff's bill, and the same were duly recorded as therein stated:

Eugene L. Wilbur and wife to William L. Lockwood, quitclaim deed for W. ½ N. E. ¼, sec. 33, t'w'p 29, R. 9.

William F. Lockwood and wife to James W. Virtue, warranty deed for W. ½ N. E. ¼, sec. 33, t'w'p 29, R. 9.

James W. Virtue to Mary A. Lockwood, warranty deed for undivided ½ of W. ½ N. E. ¼, sec. 33, t'w'p 29, R. 9.

James W. Virtur to the plaintiff, James P. Twohig, quitclaim deed for undivided ½ W. ½ N. E. ¼, sec. 33, t'w'p 29, R. 9.

3d. That the copies of the proceedings, up to and including sheriff's deed, in the district court of Dakota county, State of Nebraska, in the case of Isaac Harter, pl'ff, against William F. Lockwood, Mary A. Lockwood, his wife, and Augustus Kountze, def'ts, hereto attached are correct copies of the papers *and* file and — record in said

cause and may be used in evidence without further certification with the same force and effect as the originals.

4th. That the consideration received by Eugene L. Wilbur for the quitclaim deed of the land to William F. Lockwood for the W. ½ N. E. ¼, sec. 33, t'w'p 29, R. 9, was forty dollars in cash and property taken at a value of twenty-five dollars; that the consideration given by James P. Twohig for the conveyance to him by James W. Virtue was three hundred and fifty dollars.

5th. That Isaac Harter during his life paid and discharged all the taxes levied and assessed against the said W. ½ of N. E. ¼, sec. 33, t'w'p 29, R. 9, up to and including the year 1874; that from and including the taxes for the year 1875 to and including the taxes for the year 1888 the taxes were paid by the defendants; that annexed hereto is a statement showing the amount of such taxes and the time when each was paid.

51 6th. That up to and including the year 1865 the land was assessed and taxed in the name of Eugene L. Wilbur; in the year 1866 it was assessed and taxed in the name of no person; from 1867 to 1877, both inclusive, it was assessed and taxed in the name of Isaac Harter, and from 1878 to 1885, both inclusive, it was assessed and taxed in the name of Isaac Harter, Jr.; from 1886 to 1889, both inclusive, it was assessed and taxed in the name of Henry W. Harter, and was so carried out and shown upon the assessment and tax-rolls of Dakota county, Nebraska.

7th. That the annexed statement of Thomas L. Griffey may be read and used in evidence in the hearing of this cause as the testimony of the said Thomas L. Griffey, with the same force and effect and subject to the same objections for irrelevancy and immateriality as though the testimony of said Griffey had been regularly taken on commission according to the rules of this court.

W. E. GANTT,
C. L. WRIGHT, &
M. C. JAY,
Solicitors for Plaintiff.

J. H. & C. M. SWAN,
Solicitors for Def'ts.

Copy.

Tax Statement of Taxes Paid by the Harters upon the N. W. ¼ N. E. ¼ & S. E. ¼ N. E. ¼, Section 33, 29, 9, *Dakota County, Nebr.*

1861,	paid,	no date,	$5	02	by no name.
1862,	"	no date,	4	20	by no name.
1863,	paid	Dec. 28, '63,	4	49	by Isaac Harter.
'64,	paid	Feb. 17, '65,	4	14	" Isaac Harter, Jr.
'65,	"	Jan. 19, '66,	7	30	" " "
'66,	"	Feb. 4. '67,	7	90	" " "
'67,	"	Dec. 2, '67,	5	60	" " "
'68,	"	Feb. 19, '69,	6	54	" " "
'69,	"	Apr. 12, '70,	10	04	" " "

'70, paid Mar. 20, '71, $16 56 by Isaac Harter, Jr.
'71, " Jan. 10, '72, 22 70 " " "
'72, " Feb. 10, '73, 14 00 " " "
'73, " Jan. 21, '74, 21 35 " W. C. McBeath.
'74, " Apr. 28, '75, 26 00 " Isaac Harter, Jr.
'75, " Ap'l 22, '76, 19 91 " " "
'76, " April 26, '77, 25 71 " " "
1877, " Mar. 11, '78, 19 95 " " "
1878, " Mar. 20, '79, 14 40 " H. W. Harter,
1879, paid Feb. 10, '80, $13 00 by H. W. Harter.
52 1880, paid Jan. 20, '81, 22 54 by H. W. Harter.
1881, " Feb. 4, '82, 15 05 " " "
1882, paid Jan. 2, '83, $16 02 by H. W. Harter.
1883, " Jan. 12, '84, 18 95 " Isaac Harter, Jr.
1884, " Dec. 30, '85, 29 12 " H. W. Harter.
1885, " Dec. 19, '86, 13 10 " Isaac Harter.
1886, " Dec. 18, '87, 19 00 " W. H. Harter.
1887, " Jan. 20, '88, 76 00 " W. H. Harter.
1888, " Jan. 1, '89, 52 80 " Isaac Harter.

Testimony of Thomas L. Griffey.

In the Circuit Court of the United States for the District of Nebraska.

JAMES TWOHIG, Pl'ff,
vs.
GEORGE D. HARTER *et al.*, Def'ts.

I reside in Sioux City at present. I formerly resided at Dakota City, in Dakota county, Nebraska, and resided there since 1857. Was engaged in the practice of law and the real-estate business for a great many years. I knew William F. Lockwood, Mary A. Lockwook, his wife; also Jas. W. Virtue, and was well acquainted with each of them. They all resided from 1856 or 1857 to 1862 at Dakota City. They were engaged while living there at Dakota City quite extensively in real estate transactions and did quite a business in that line. In 1862 William F. Lockwood and wife left Dakota City and returned to Ohio, where they have since that time resided. Neither of them have been back to Dakota City since their departure, that I am aware of, and I think I should have known it if they had. James W. Virtue left Dakota City some time in the year 1863 or 1864 and went west to Washington Ter., where he has since resided. From the time he left Dakota City until the summer of 1888 he did not return to Dakota City prior to their leaving Dakota City. While they were there I frequently did business with them and knew considerable of their business transactions.

When James W. Virtue left he left his business matters with Kountze Bros., at Omaha, and I attended to his matters under their directions. Whenever Virtue required anything done it was
53 done by me through Kountze Bros.' directions. The only property that I had any instructions about were some lots in

Dakota City—lot 1, block 72, and lot 4, in block 49; lot 3, in block 121; lot 9, in block 136; lot 3, in block 142; lot 15, in block, 174; lot 17, in block 184; lots 9, 10, 11, and 12, in block 143. These lots stood in the name of Augustus Kountze until June 20, 1877. I knew, however, they were Virtue's lots, and by Kountze's direction I paid the taxes upon them until after they were transferred. I do not think that either Lockwood or Virtue, other than as above, left their business with any one or left any directions with any one to look after their property or interests here, if they claimed any.

I am well acquainted with the west half of the northeast quarter of section 33, township 29, range 9, in Dakota county, and have known it ever since I lived in Dakota county. I formerly, in connection with my other business, had an abstract of title to the property in Dakota county, and I know as a matter of fact that Lockwood or Mrs. Lockwood and Virtue had a deed from Wilbur for the land, and that they owned it subject to a trust deed given to Mr. Kountze to secure the Harter note. The value of the land in 1858 was from $1.25 to $5 per acre, $1.25 being the Government price at which the land was entered. From that time for the next ten years the land had not improved much in value and did not improve much in value until along in 1870. In 1877, at the time the mortgage was foreclosed, the value of the land would not exceed $10 or $12 per acre, and from that time on there was a moderately steady growth in price, so that by 1885 or 1886 the land was worth from $25 to $30 per acre. In 1887 there was a sharp increase in value, and when the railroad bridge across the Missouri river was constructed, a small town started near the land, its prices suddenly raised in value, so that in 1888 the value of the land was from $75 to $100 per acre, and would probably have not sold for a greater price.

54 The land has never to my knowledge been in actual occupation of any person, it having been lying vacant. The only use made of it was that of open pasturage for the cattle in the vicinity. In referring to it or designating it in general terms it has been designated as the "Harter land" in the community, but has been used as common for pasturage by any one desiring to do so.

THOS. L. GRIFFEY.

Petition.

District Court, Dakota County, Sixth Judicial District of Nebraska.

ISAAC HARTER
vs.
WILLIAM F. LOCKWOOD & MARY A. LOCKWOOD, His Wife, and AUGUSTUS KOUNTZE.

The petition of Isaac Harter, the plaintiff herein, respectfully shows to the court:

1. That on the 27th day of February, 1858, at Dakota, in said county, Eugene L. Wilbur made to said plaintiff his certain promis-

sory note dated on said day, at said place, whereby, twelve months after date, for value received, he promised to pay said plaintiff or bearer one hundred and forty dollars, and if not paid when due interest at the rate of four per cent. per month until paid, and delivered the same for value to said plaintiff. On the same day he made his certain indenture of mortgage or deed of trust, bearing date on said day, whereby, in order to secure the payment of said note, he conveyed to the said defendant, Augustus Kountze, in trust the following-described premises, to wit, "the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9), east of the sixth principal meridian, in Nebraska Territory;" and thereunder was written a condition reciting the said note and to the effect that if he failed to pay the said sum of money or any part thereof when the same became due the
55 said Kountze, as his trustee, should, upon certain proceedings therein mentioned, sell the said premises, but that if he paid the said indebtedness to said plaintiff or his assigns the said conveyance should be void; otherwise of full force; and he also promised therein to pay all the costs of sale and attorney's fees; which deed of trust or mortgage, being by him duly executed and acknowledged, was duly recorded in the office of the register of deeds of said county on the same day. No part of the said deed has ever been paid or collected nor have any proceedings been had at law for the recovery thereof.

On the 20th day of March, 1860, the said Wilbur and wife conveyed said premises to the defendant William F. Lockwood, who, on the 6th day of February, 1861, conveyed the same to James W. Virtue, who, on the 30 of February, 1863, conveyed the same to Mary A. Lockwood. This defendant has been in the actual possession of said premises and paid all the taxes levied and assessed thereon from the date of said mortgage to this time. The said defendant Lockwood and Mary A., his wife, and James W. Virtue have been and are now non-residents of this State and absent therefrom continuously ever since the first day of July, 1863.

The said plaintiff prays judgment of this court as follows, viz: That the said defendants may be foreclosed of all right of redemption in and to said premises; that the sum due on said mortgage be ascertained and declared; that the premises be sold to pay the sum so found due, with the costs of this action, and that the said plaintiff may have all such other and further relief as the circumstances of the case required.

ISAAC POWERS, JR.,
Att'y for Plaintiff.

STATE OF NEBRASKA, }
Dakota County, } ss:

I, J. P. Twohig, clerk of the district court in and for Dakota county, Nebraska, do hereby certify the above and foregoing
56 is a true copy of the records in said county.

Witness my hand and seal the 7th day of November, 1889.

[SEAL.] J. P. TWOHIG, *Clerk.*

District of Nebraska, Dakota County.

ISAAC HARTER
vs.
WILLIAM F. LOCKWOOD and MARY A. LOCKWOOD, His Wife, and AUGUSTUS KOUNTZE.

STATE OF NEBRASKA, *Douglas County,* } *ss :*

Herman Kountze, being duly sworn, says that he is agent of the plaintiff in the above-entitled action; that the plaintiff herein is not a resident of the State of Nebraska; that deponent has read the foregoing petition and knows the contents thereof, and deponent further says the facts stated in said petition are, according to the best of his knowledge, information, and belief, true in substance and in fact; and further he saith not.

[SEAL.] HERMAN KOUNTZE.

Subscribed in my presence and sworn to before me this 21st day of February, 1876.

JAMES S. FRANCE,
Notary Public.

Endorsed: State of Nebraska, Dakota county, *ss.* I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Nebr., do hereby certify that the above and foregoing is a true and correct copy of the records in the above case. Witness my hand and seal this 7th day of Nov., 1889. (Seal.) J. P. Twohig, clerk. Endorsed: District court, Dakota county. Isaac Harter *vs.* William F. Lockwood *et al.* Petition. Filed Feb'y 28, 1876. W. C. McBeath, clerk. Isaac Powers, att'y for pl'ff.

57 In the District Court of said County.

ISAAC HARTER
vs.
W. F. LOCKWOOD.

STATE OF NEBRASKA, *Dakota County.*

The clerk of said court will issue an order for the sale of the premises decreed to be sold in this case, and direct the same to the sheriff of said Dakota county, returnable as by law directed.

ISAAC POWERS, JR.,
Att'y for Pl'ff.

Endorsed; State of Nebraska, Dakota county, *ss:* I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Nebraska, do here— that the within and foregoing is a true and correct copy of the records in the above case. Witness my hand and seal this 7th Nov., 1889. (Seal.) J. P. Twohig, clerk. Harter *vs.* Lockwood. Precipe. Filed June 28th, 1876. W. C. McBeath, clerk.

District Court, Dakota County.

ISAAC HARTER
vs.
WILLIAM F. LOCKWOOD and MARY A. LOCKWOOD, His Wife, and AUGUSTUS KOUNTZE.

STATE OF NEBRASKA, } *ss:*
Douglas County, }

Herman Kountze, being duly sworn, says he is the agent of the plaintiff in the above-entitled action; that the defendants therein are and each of them is a non-resident of this State and cannot be served with summons therein; that said action is brought to foreclose a mortgage and for a sale thereunder of lands situated in the county of Dakota, in the State of Nebraska.

HERMAN KOUNTZE.

58 Subscribed in my presence and sworn to before me this (21st) 21st day of February, 1876.

JAMES S. FRANCE,
Notary Public.

Endorsed: State of Nebraska, Dakota county, *ss:* I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Nebraska, do hereby certify that the within and foregoing is a true and correct copy of the records. Witness my hand and seal this 7th day of Nov., 1889. (Seal.) J. P. Twohig, clerk. Endorsed: District court, Dakota county. Isaac Harter *vs.* William F. Lockwood *et al.* Affidavits that defendants are non-residents. Filed Feb'y 28, 1876. W. C. McBeath, clerk.

Proof of Publication.

I, John T. Spencer, being duly sworn according to law, do say that I am one of the publishers of the Dakota City Mail, a weekly newspaper published in Dakota City, Dakota county, State of Nebraska, and having a circulation in said county and elsewhere, and that the notice hereto attached has been published in said paper for four successive weeks, the last publication being on the 24th day of March, 1876.

JOHN T. SPENCER.

Sworn and subscribed to before me this 30th day of May, 1876.
[SEAL.] ISAAC POWERS, JR.,
Notary Public.

Fees.

Publication	$7 50
Affidavit	25

To William F. Lockwood and Mary A., his wife, and Augustus Kountze:

Take notice that you have been sued by Isaac Harter in the district court of the State of Nebraska for the county of Dakota, and that you are required on the 10th day of April, 1876, to file your answer to this petition, filed in the clerk's office of said court.

The object and prayer of said petition is the foreclosure of
59 a mortgage or deed of trust made by Eugene L. Wilbur to said Kountze, as trustee, on the 29th day of November, 1868, conveying the west half of the northeast quarter of section thirty-three, in said county, to secure a note made by said Wilbur to said Harter on the same day for one hundred and forty dollars, with interest, from maturity until paid, at four per cent. per month, and for a sale of said mortgage- premises and other relief.

March 3d, 1876, w4.

ISAAC POWERS, JR.,
Att'y for Plaintiff.

Endorsed: State of Nebraska, Dakota county, *ss:* I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Nebraska, do hereby certify that the within and foregoing is a true and correct copy of the records. Witness my hand and seal this 7th Nov., 1889. (Seal.) J. P. Twohig, clerk. Harter *vs.* Lockwood *et al.* Proof of publication. Filed May 30th, 1876. W. C. McBeath, clerk.

Execution.

THE STATE OF NEBRASKA, } *ss:*
Dakota County, }

ISAAC HARTER
vs.
WM. F. LOCKWOOD and MARY A. LOCKWOOD, His Wife, and AUGUSTUS KOUNTZE.

The people of the State of Nebraska to the sheriff of said county, Greeting:

Whereas at the June term, 1876, of the district court of said county, on the 5th day of June, 1876, at the town of Dakota City therein, in a certain cause wherein Isaac Harter was plaintiff and Wm. F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze were defendants, judgment for the sum of twelve hundred
60 and forty-eight dollars, principal, and fourteen & $\frac{68}{100}$ dollars, costs of suit, was rendered against the defendants and for the sale of the mortgaged premises, to wit, the west half of the northeast quarter of section thirty-three, in township twenty-nine, range nine east, and in favor of said plaintiff; and it appearing from the records of said court that there is still due on said judgment the sum of twelve hundred and sixty-two & $\frac{68}{100}$ dollars and interest, at 10 per cent., from June 5, 1876:

Now, therefore, in the name and by the authority of said State you are hereby commanded that of the lands and tenements above

described found in said county you cause to be made the sum of twelve hundred and forty-eight dollars, together with interest thereon, at the rate of 10 per cent. per annum, from the 5th day of June, 1876, until paid; also fourteen & $\frac{68}{100}$ dollars, costs of suit, and all costs accruing thereon, and have the said several sums of money, with the accruing costs and this writ, before the clerk of the district court, at Dakota City, within sixty days, then and there to render unto the respective persons entitled thereto.

Witness my signature and the seal of our said district court, at Dakota City, this 28th day of June, A. D. 1876.

[SEAL.] W. C. McBEATH, *Clerk.*

Endorsed: State of Nebraska, Dakota county, *ss:* I, J. P. Twohig, clerk of the dist. court of Dakota county, Nebraska, do hereby certify that the within and foregoing is a true copy of the records. Witness my hand and the seal this 7th Nov., 1889. J. P. Towhig, clerk. (Seal.) Isaac Harter *vs.* Wm. F. Lockwood *et al.* In the district court. Record, p. —; appearance docket, p. —; judgment docket, p. —; execution docket, p. —. Damage, $1,248. Costs, 14.68. Int. from June 5, 1876, to —— —, 18—. Increase costs, 1.50. Total, —. Returned —— —, 18—. I. Powers, Jr., att'y for pl'ff.

Inventory and Appraisement.

ISAAC HARTER
vs.
WM. F. LOCKWOOD and MARY A. LOCKWOOD and AUGUSTUS KOUNTZE.

We, Nick Maher, sheriff of Dakota county, State of Nebraska, and Phil. Graves and L. Beitler, two residents of said county, who,
61 being first duly sworn to truly inventory and appraise the following-described property, being real estate levied upon by order of sale as the property of William F. Lockwood and Mary A. Lockwood and Augustus Kountze, to satisfy a judgment in favor of Isaac Harter, to wit, the N. W. ¼ of N. E. ¼ of sec. 33, t'p 29, R. 9 E., 40 acres, appaised at 22 — per acre, $880, and the S. W. ¼ of N. E. ¼ of sec. 33, t'p 29, R. 9 E., 40 acres, appraised at $22.00, $880, located in Dakota county, Neb.

NICK MAHER, *Sheriff,*
LEVIS BEITLER,
PHIL. GRAVES, "
Appraisers.

STATE OF NEBRASKA, }
County of Dakota, } *ss:*

We, Philo Graves and L. Beitler, appraisers appointed to appraise the land within described, levied upon by order of sale issued out of the clerk's office of the district court in favor of Isaac Harter and against Wm. F. Lockwood, Mary A. Lockwood, and Augustus Kountze, *we* do solemnly swear that we are disinterested freeholders

and residents of said county, and that we will impartially and faithfully appraise said land, as by law *requested.*

L. BEITLER.
PHILO GRAVES.

Subscribed and sworn to before me and in the presence of Philo Graves and L. Beitler this 10th day of July, 1876.

NICK MAHER, *Sheriff.*

Endorsed: State of Nebraska, Dakota county, *ss:* I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Nebraska, do hereby certify that the within and foregoing is a true copy of the records. Witness my hand and seal this 7th Nov., 1889. (Seal.) J. P. Twohig, clerk. Isaac Harter *vs.* Wm. F. Lockwood *et al.* Appraisement.

Proof of Publication.

Adv'g, $9.00; affidavit, .25—$9.25.

I, L. Atlee Hart, being duly sworn according to law, do say that I am one of the publishers of the North Nebraska Eagle, a weekly newspaper published in Dakota City, Dakota county, State of Nebraska, and having a circulation in said county and elsewhere, and that the notice hereunto attached has been published in said paper for five successive weeks, the last publication being on the 9th day of August, 1876.

L. ATLEE HART.

Sworn to and subscribed before me this 12th day of August, 1876.

KELLY W. FRAZER,
County Judge.

Sheriff's Sale.

By virtue of an order of sale issued out of the clerk's office of the district court for Dakota county, State of Neb., and to me directed, I will, on the 12th day of August, 1876, at 10 o'clock a. m. of said day, at the front door of the court-house, in said county, in Dakota City, proceed to sell to the highest and best bidder, for cash, the following land and tenements, ordered sold, or so much thereof as may be necessary to pay the sum of $1,248.00, with interest, at 10 per cent. per annum, from the 5th day of June, A. D. 1876, and cost of suit and accruing costs, to satisfy a judgment of said district court at the June term thereof, A. D. 1876, in favor of Isaac Harter and against Wm. Lockwood, Mary A. Lockwood, and Augustus Kountze, to wit, the N. W. qr. of the N. E. qr., containing 40 acres, and the S. W. qr. of the N. E. qr., containing 40 acres, in section 33, township 29, range 9 east, in all 80 acres, located in Dakota county, State of Nebraska.

62

7–5w NICK MAHER, *Sheriff.*

Dakota City, Neb., July 10th, 1876.

Endorsed: Proof of pub. Filed Aug. 12, 1876. W. C. McBeath, clerk.

THE STATE OF NEBRASKA, } ss:
Dakota County, }

Received this order this twenty-eight- day of June, A. D. 1876, at 10 o'clock a. m., and, according to the command thereof, I summoned L. Beitler and Philo Graves, two disinterested freeholders of said county, and administered to them an oath impartially to appraise the interest of Wm. F. Lockwood, Mary A. Lockwood, & Augustus Kountze, defendants, in said lands and tenements upon actual view thereof, and I, together with said L. Beitler and Philo Graves, made an appraisement in writing of said lands and tenements, which appraisement is herewith returned, a copy of which I forthwith deposited with the clerk of the district court of said county, together with the certificate of the county clerk, clerk of the district court, and treasurer of said county, and thereupon, on the 12th day of July, A. D. 1876, I caused a notice to be published in the North Nebraska Eagle, a newspaper printed and in general circulation in said county, and by posting written or printed
63 notices of said sale, as by law directed, that I would offer said land for sale at the south door of the court-house, in Dakota City (that being the building wherein the last term of the district court of said county was held) on the 12th day of August, A. D. 1876, at 10 o'clock a. m. of said day. After having so advertised the same for more than thirty days and at the time and place stated in said notice, I offered the said lands and tenements for sale at public auction and sold the same as follows, to wit: The northwest quarter of the northeast quarter of section thirty-three (33), township twenty-nine (29), range nine (9) east, & sold the same to Isaac Harter for the sum of twelve hundred dollars, he being the highest bidder therefor and that sum being not less than two-thirds of the appraised value thereof.

Amount of principal	$1,248 00
" " interest	24 03
Principal and interest	$1,272 03
Items of sheriff's costs:	
Making levy	$1 50
Calling appraisers	60
Swearing	30
Fees of appraisers	1 30
Copy of appraisements	25
Advertisement of sale	3 00
Costs of publication	9 25
Making sale	
Commission on sale	29 00
Clerk's & treasurer's certificates	4 00
Making deed	
Mileage	1 28
Total costs of sale	$52 48

Amount of proceeds of sale	$1,200 00
Costs of court	14 96
Sale	52 48
Total costs	69 44
Applicable upon judgment	$
Amount of	$

Given under my hand this 18th day of August, A. D. 1876.

NICK MAHER,
Sheriff of Dakota County.

Endorsed: State of Nebraska, Dakota county, *ss:* I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Neb., do hereby certify that the within and foregoing is a true copy of the records in the above case. Witness my hand and seal this 7th Nov., 1889. J. P. Twohig, clerk. Return to order of sale. Doc. —, page —. Isaac Harter, pl'ff, *vs.* Wm. F. Lockwood *et al.*, def'ts. Returned and filed. —— —, 187–. —— ——, clerk. —— ——, deputy.

64 Eugene L. Wilbur to Isaac Harter.

Know all men by these presents that I, Eugene L. Wilbur, of Dakota county, Nebraska Territory, in order to secure to Isaac Harter payment of the indebtedness hereinafter described, do hereby sell and convey unto Augustus Kountze, of Douglas county, in said Territory, in trust the following-described premises, to wit: West half (½) of northeast quarter (¼), section N. thirty-three (33), township N. twenty-nine (29), range nine (9) east of 6 P. M., in Nebraska Territory—

On condition that whereas the said Eugene L. Wilbur is justly indebted to the said Isaac Harter one hundred & forty dollars, as follows: A certain promissory note for one hundred & forty dollars, bearing even date herewith & payable to Isaac Harter twelve months after date:

Now, if the said Eugene L. Wilbur fail to pay said sum of money or any part thereof when due, then the said Augustus Kountze, my trustee, shall, after having given four weeks' notice by publication in some newspaper circulated in Dakota county, N. T., proceed to sell at public sale to the highest bidder the west ½ of northeast ¼ of section (33), township No. (29), range (9) east, the above-described real estate, and out of the proceeds of such sale pay what remains unpaid of said indebtedness (together with all costs of sale & attorney's fees), and shall hold the surplus, if any, subject to the order of said Eugene L. Wilbur; but if the said Eugene L. Wilbur shall pay the said indebtedness to the said Isaac Harter or his assigns at the said time of payment, then this conveyance to be void; otherwise of full force.

Signed this twenty-seventh day of November, A. D. 1858.
EUGENE L. WILBUR.

In presence of—
JAS. W. VIRTUE.

65 TERRITORY OF NEBRASKA, }
Dakota County. }

On this 27th day of November, A. D. 1858, before me, a notary public in and for said county, personally came Eugene L. Wilbur, to me known to be the identical person whose name is affixed to the above deed as grantor, and acknowledged the same to be his voluntary act and deed.

[L. S.] JAMES W. VIRTUE,
Notary Public.

Filed for record November 27th, A. D. 1858, at 5 o'clock p. m.
JOHN M. HAYES, *Register.*

STATE OF NEBRASKA, } *ss:*
County of Dakota, }

I, J. P. Twohig, clerk in and for Dakota county, do hereby certify that the above and foregoing instrument is a true and correct copy of the same as appears of record in this office.

Witness my hand and official seal this 14th day of Nov., A. D. 1889, at Dakota City, Neb.

[SEAL.] J. P. TWOHIG, *Co. Clerk.*

June Term, Dakota County, Nebraska.

ISAAC HARTER
vs.
WILLIAM F. LOCKWOOD, MARY A. LOCKWOOD, His Wife, and AUGUSTUS KOUNTZE.

Now, at this time, June 5, 1876, this cause came on for trial, Isaac Powers, Jr., appearing for the plaintiff, and the said defendant, though duly served with process, came not, but made default and, the said plaintiff not requiring a jury, this cause is submitted to the court; and the court, after hearing the proofs affixed and examining the pleadings, finds there is still due and unpaid on the mortgage or trust deed mentioned in plaintiff's petition the sum of $1,248.00.

It is therefore ordered and adjudged and decreed by the court
66 that said premises mentioned in said mortgage and described as follows, to wit ,the west ½ of the northeast quarter of section 33, township 29, range 9 east of the sixth principal meridian, in Dakota county, Nebraska, be sold as by law provided for the sale of mortgaged premises, and that the proceeds of said sale be applied in satisfaction of the amount so as aforesaid found due the said plaintiff, to wit, $1,248.00, with interest thereon from date hereof, and that the costs of said suit, taxed at $14.68, and all accruing costs be

paid out of said proceeds of said sale, and that the said defendant be forever barred and foreclosed of all right, title, or interest in and to the above-described mortgaged premises.

STATE OF NEBRASKA, } ss:
Dakota County, }

I, J. P. Twohig, clerk of the district court in and for Dakota county, Nebraska, do hereby certify that I have carefully examined the court journal of the office of district court for Dakota county, Nebraska, from June 5th, 1876, to Oct. 30th, 1877, and find no other journal entries of record in the within cause except the within. I further certify that this is the only journal entry made or of record in the above-entitled cause.

Witness my hand and seal of said court this 12th day of Nov., 1889.

J. P. TWOHIG, *Clerk.* [SEAL.]

67 *Court Calender, June,* 1876.

Att'ys.	Parties.	Kind of action.	Proceedings.
J. Powers, Jr.	Isaac Harter *vs.* Wm. F. Lockwood.	Foreclosure.	June 5, '76.—Default. Judgment for pl'ff for $1,248.00. Mortgaged premises ordered sold.
	November term, 1876.		
J. Powers, Jr.	Isaac Harter *vs.* Wm. F. Lockwood.	Confirmation.	Nov. 13, '76.—Def't to show cause by the coming of court to-morrow morning why sale should not be confirmed. 14, '76.—Continued.
	No journal entry.	J. P. Twohig,	clerk.
	April, 1877.		
J. Powers, Jr.	Isaac Harter *vs.* Wm. F. Lockwood.	Confirmation.	April 10.—Ordered that cause be shown by to-morrow morning why sale should not be confirmed. April 11, sale confirmed.
	No journal entry.	J. P. Twohig,	clerk.

STATE OF NEBRASKA, } ss:
Dakota County, }

I, J. P. Twohig, clerk of the dist. court in and for Dakota county, Nebraska, do hereby certify the above is all and a true copy of the proceedings found on the court calender in the above-entitled cause.

Witness my hand and seal the 12th day of Nov., 1889.

[SEAL.] J. P. TWOHIG, *Clerk.*

68 *Sheriff's Deed.*

Nicholas Maher, sheriff,
to
Isaac Harter.

This indenture, made the tenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven, between Nicholas Maher, sheriff of Dakota county, Nebraska, of the first part, and Isaac Harter, of the second part:

Whereas at a term of the district court of the sixth judicial district of the State of Nebraska in and for Dakota county, held at the court-house, in Dakota City, in said county, on the fifth day of June, in the year of our Lord one thousand eight hundred and seventy-six, it was among other things ordered, adjudged, and decreed by said court in a certain cause depending in said court between Isaac Harter, plaintiff, and William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze, defendants, that the mortgaged premises mentioned and set forth in the pleadings in the said cause be sold by or under the direction of the said party of the first part, at public auction, in the county where the said premises directed to be sold are situated, the said sheriff first giving public notice of the time and place of said sale according to law and the practice of the said court; and whereas the said Nicholas Maher, sheriff as aforesaid and party of the first part to these presents, in pursuance of the order and decree of said court, did on the twelfth day of August, A. D. 1876, sell at public auction, at the court-house, in Dakota City, in said county and State, the said mortgaged premises hereinafter particularly described, having first given the previous notice of the time and place of said sale, with a brief description of said mortgaged premises as required by the order and decree aforesaid, at which sale the premises were struck off to Isaac Harter, the said party of the second part to these presents, for the sum of
69 twelve hundred dollars, that being the highest sum bidden therefor, and being more than the two-thirds of the appraised value thereof:

Now, therefore, this indenture witnesseth: That the said Nicholas Maher, sheriff as aforesaid, in order to carry into effect the said sale so made as aforesaid in pursuance of the said decree, and also by virtue of the statute in such case made and provided, and in consideration of the premises and the sum of twelve hundred dollars paid by the said party of the second part to these presents to the said Nicholas Maher, sheriff as aforesaid, the receipt whereof he doth hereby confess and acknowledge, and by these presents doth grant, bargain, and convey *with* the said party of the second part, and to his heirs and assigns forever, all that certain piece or parcel of land, to wit:

The west one-half (½) of the northeast quarter of section thirty-three (33), township twenty-nine (29), range nine (9) east, in Dakota county, Nebraska, containing eighty acres, together with all and singular the rights, titles, members, privileges, hereditaments, and

appurtenances to the same belonging or in anywise appertaining; to have and to hold said premises above described and hereby intended to be granted and conveyed unto the said party of the second part, his heirs and assigns, to them and their own proper use and behoof forever.

In testimony whereof the said party of the first part has hereunto set his hand the day and year first above written.

NICHOLAS MAHER,
Sheriff Dakota County, Nebraska.

Signed and delivered in presence of—
W. C. McBEATH.

STATE OF NEBRASKA, }
County of Dakota, } ss:

On this tenth day of May, 1877, before me, the undersigned notary public within and for said county, personally appeared Nicholas Maher, sheriff, to me known to be the identical person described in
70 and who executed this indenture, and acknowledged that he executed the same as his voluntary act and deed for the uses and purposes herein mentioned.

In testimony whereof I have hereunto set my hand and seal, at Dakota City, Nebr., this 10th day of May, A. D. 1877.

[L. S.] ISAAC POWERS, JR.,
Notary Public.

Filed for record June 1st, 1877, at 8 o'clock a. m.

W. C. McBEATH,
County Clerk.

STATE OF NEBRASKA, }
Dakota County, } ss:

I, J. P. Twohig, Co. clerk of Dakota county, Nebraska, do hereby certify that the above is a true copy of the above instrument as appears of record in Dakota county, Nebr.

Witness my hand and seal of said county this 14th day of Nov., 1889.

[SEAL.] J. P. TWOHIG, *Clerk.*

Interrogatories to be Propounded to J. P. Twohig.

Int. 1st. State your name, age, place of residence, and occupation.

Int. 2nd. Are you the plaintiff in this action?

Int. 3rd. Have you in your possession or under your control either of the following original deeds for the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9) east, Dakota county, Nebraska: Deed from Eugene L. Wilbur and wife to William F. Lockwood, dated March 2nd, 1860, and recorded on the 3rd day of March, 1860; deed from W. F. Lockwood and wife to James W. Virtue, dated 6th of February, 1861, and recorded the 22nd day of March, 1861?

Int. 4th. Have you in your possession or under your control the original deed made by James W. Virtue and wife to Mary A. Lockwood for the undivided one-half (½) of the west half (½) of the north-
east quarter (¼) of section thirty-three (33), township twenty-
71 nine (29), range nine east, dated the 3rd day of February, 1863, and recorded March 5th, 1863?

Int. 5th. Have you the original deed made by James W. Virtue to you for the land in controversy, dated September 3rd, 1888? If so, please attach the same to your answers to these interrogatories.

Cross-Interrogatories to be Propounded to J. P. Twohig.

Interrogatory 1. How long have you resided in Dakota county, and in what portion of the county have you resided?

Interrogatory 2. Do you hold any official position in Dakota county, Nebraska; and, if so, what?

Interrogatory 3. Have you had any correspondence with any of the defendants in this action; and, if so, when did the said correspondence commence? Who wrote the first letter?

Interrogatory 4. Have you in your possession or under your control any letters received by you from Isaac W. Harter or any of the other defendants in this action?

Interrogatory 5. If in answer to the 4th cross-interrogatory you state you have such letters or that they are under your control, will you produce the same to the commissioner taking your evidence and have the same identified as a part of your deposition as an exhibit?

Interrogatory 6. Are you personally acquainted with either William F. Lockwood, Mary A. Lockwood, his wife, or James W. Virtue; if so, for how long have you been personally acquainted with either?

J. H. & C. N. SWAN,
Att'ys for Def't.

In the United States Circuit Court in and for the District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER *et al.*, Defendants.

72 It is hereby stipulated and agreed by and between the parties hereto that the deposition of Kelly W. Frazer and Eugene L. Wilber, both of Dakota City, Nebraska, may be taken in the above-entitled cause before any notary public in and for Dakota county, Nebraska, on the interrogatories and cross-interrogatories hereto attached, and when so taken to be returned and filed in said cause.

And said deposition to be read in evidence in said cause in behalf of plaintiff, and the parties hereto waive the issuing of any commission or further notice, and said deposition to have the same force

and effect as if taken on due and legal notice and commission, but subject to all other legal objections.

C. L. WRIGHT,
W. E. GANTT, AND
MELL JAY,
Att'ys for Pl'ff.
J. H. & C. M. SWAN,
Att'ys for Def'ts.

Cross-Interrogatories to be Propounded to Kelly W. Frazer and to Eugene L. Wilbur.

Interrogatory 1. Were you acquainted with William F. Lockwood or Mary A. Lockwood or with James W. Virtue or either of them? If not with all of them, with which were you acquainted?

Interrogatory 2. If you answer that you were acquainted with them or either of them, state when and for how long you knew each of them.

Interrogatory 3. Where were the said William F. Lockwood and James W. Virtue living when you were acquainted with them?

Interrogatory 4. Did William F. Lockwood and James W. Virtue ever live in Dakota county, Nebraska; and, if so, where in said county did they reside, and whether they reside in said county now or not?

Interrogatory 5. If you say that either Wm. F. Lockwood or James W. Virtue or both resided in Dakota county and neither or either do not not reside in said county, state as near as you can when each removed from the county.

Interrogatory 6. State if you know where each removed to
73 and where each now reside.

Interrogatory 7. State all you know of the residence and whereabout- of both Wm. F. Lockwood and James W. Virtue since they ceased to be residents of Dakota county.

Interrogatory 8. Do you know of either Wm. F. Lockwood or James W. Virtue being back in Dakota county since they ceased to reside there? If so, when and how long did they remain?

Interrogatory 9. Do you know whether either Wm. F. Lockwood or James W. Virtue had any person as an agent in Dakota county or any one attending to their or either of their business after they left the county? If so, who was it and how long did such person continue to act for them to your knowledge?

Interrogatory 10. If you know sny such person, do you know — such person ever making any claim or exercising any rights or doing anything with the land in controversy? If so, when and what was it?

Interrogatory 11. How far from the land described in interrogatory 3 do you reside and how far from it have you resided during the time you have resided in the county and how intimate- have you been acquainted with it?

Interrogatory 12. As whose land has this been generally known and designated in the neighborhood and for how long?

Interrogatory 13. Are you acquainted with the values of farming lands in the vicinity of this land and for how long have you been acquainted with such values?

Interrogatory 14. If you say you are and have been acquainted with the values of lands in the vicinity of the land in question, state what would be a fair market value of this land in 1860 and from that time up to the year 1877.

Interrogatory 15. What would be a fair market value for it from 1877 to the year 1885?

Interrogatory 16. What would be a fair market value for the land in Sept., 1888?

74 Interrogatory 17. If the value given by you of the land in 1888 is higher than those of previous years, state about at what time the value of the land commenced to increased and state, if you know, any matters and things occurred or occurring which raised or tended to increase its value.

Interrogatory 18. State fully about the condition of the land and its value since the year 1860.

Interrogatories to be Propounded to Kelly W. Frazer and Eugene L. Wilbur.

1st. Please state your name, age, place of residence, and occupation.

2nd. How long have you lived in Dakota county, Nebraska?

3rd. Are you acquainted with the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9); and, if so, how long have you known it?

4th. What opportunity have you had to see said land and during what period of time?

5th. Please state whether or not said land or any part of it has been improved in any way or occupied in any way since you have known it.

6th. During the time you have known said land has any one been in the actual possession of said land?

7th. State what had been the character of said land since you have known it, as to its being unimproved wild land or otherwise.

8th. Has it ever been fenced or enclosed in any way since you have known it?

In the United States Circuit Court in and for the District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER *et al.*, Defendants.

75 It is hereby stipulated and agreed by and between the parties hereto that the deposition of Kelly W. Frazer and Eugene L. Wilbur, both of Dakota City, Nebraska, may be taken in the above-entitled cause before any notary public in and for Dakota state county, Nebraska, on the interrogatories and cross-interrogatories

hereto attached, and when so taken to be returned and filed in said cause.

And said deposition to be read in evidence in said cause in behalf of plaintiff, and the parties hereto waive the issuing of any commission or further notice, and said deposition to have the same force and effect as if taken on due and legal notice and commission, but subject to all legal objections.

C. L. WRIGHT, GANTT & JAY,
Att'ys for Pl'ffs.

J. H. & C. M. SWAN,
Att'ys for Def't.

In the United States Circuit Court in and for the District of Nebraska.

JAMES P. TWOHIG
vs.
GEORGE D. HARTER *et al.*

Deposition of witnesses taken before me, Geo. H. Fair, a notary public within and for Dakota county, Nebraska, to be used in an action wherein James P. Twohig is plaintiff and George D Harter *et al.* defendants, pending in the United States circuit court within and for the district of Nebraska, in pursuance of the annexed notice, and at Dakota City, in said county and State, on the 4th day of October, 1889, upon the interrogatories and cross-interrogatories hereto attached.

The following-named witnesses were introduced and testified as follows:

KELLY W. FRAZER, being first duly sworn, testified as follows, to wit:

76 Int. 1. Please state your name, age, place of residence, and occupation.

Ans. Kelly W. Frazer. I am 57 years old. I live in Dakota City, Dakota Co., Nebr., and am an attorney-at-law.

Int. 2. How long have you lived in Dakota county, Nebraska?

Ans. I have lived in Dakota county since 1867.

Int. 3. Are you acquainted with the west half (W. ½) of the north-east quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9); and, if so, how long have you known it?

Ans. I have known and passed by the described land frequently since 1858.

Int. 4. What opportunity have you had to see said land and during what period of time?

Ans. By frequently passing along the public road adjoining said land and upon its west side. I have passed many times each year since 1858.

Int. 5. Please state whether or not said land or any part of it has been improved in any way or occupied in any way since you have known it.

Ans. I have never seen any improvements or occupancy on said land as I now recollect.

Int. 6. During the time you have known said land has any one been in the actual possession of said land?

Ans. Not that I have seen or remember of.

Int. 7. State what has been the character of said land since you have known it, as to its being improved, wild land, or otherwise.

Ans. It always appeared to be wild land.

Int. 8. Has it ever been fenced or enclosed in any way since you have known it?

Ans. To the best of my recollection, it has not.

77 Cross-interrogatories:

Int. 1. Were you acquainted with William F. Lockwood or Mary A. Lockwood or with James W. Virtue or either of them? If not with all of them, with which were you acquainted?

Ans. I knew William F. Lockwood and James W. Virtue. I did not know Mary A. Lockwood.

Int. 2. If you answer that you were acquainted with them, state when and for how long you knew each of them.

Ans. I knew James W. Virtue from 1858 until about 1862 or 1863, when he left the country. I knew William F. Lockwood from 1858 until about 1866 or 1867, when he went to Ohio. Since that time I have had a correspondence and business acquaintance with both of them.

Int. 3. Where were the said William F. Lockwood and James W. Virtue living when you were acquainted with them?

Ans. They then lived in Dakota City, Nebr.

Int. 4. Did the said Wm. F. Lockwood and James W. Virtue ever live in Dakota county, Nebraska; and, if so, where in said county did they reside, and whether they reside in said county now or not?

Ans. Yes; they both lived in Dakota county, Nebraska, at Dakota City, in said county. They do not reside in said county now.

Int. 5. If you say that either William F. Lockwood or James W. Virtue or both reside- in Dakota county and neither or either do not reside in said county, state, as near as you can, when each removed from the county.

Ans. I think James W. Virtue removed about 1862 or 1863 and William F. Lockwood removed about 1866 or 1867.

Int. 6. State, if you know, where each removed to and where each now resides.

Ans. I do not know where either one first settled after leaving here. Virtue now resides in Baker City, Oregon, and Lockwood is in or near Toledo, Ohio.

78 Int. 7. State all you know of the residence and whereabouts of both William F. Lockwood and James W. Virtue since they ceased to be residents of Dakota county.

Ans. I never knew of them residing at any other place than those stated in the preceeding answer.

Int. 8. Do you know of Wm. F. Lockwood or James W. Virtue being back in Dakota county since they ceased to reside there? If so, when and how long did they remain?

Ans. James W. Virtue was back to Dakota county about a year ago. He remained in and about the county for about a week. Lockwood has never been back, so far as I know.

Int. 9. Do you know whether William F. Lockwood or James W. Virtue had any person as an agent in Dakota county or any one attending to their or either of their business after they left the county? If so, who was it and how long did such person continue to act for them, to your knowledge?

Ans. I have no knowledge of any such agent.

Int. 10. If you know any such person do you know — such person ever making any claim or exercising any rights or doing anything with the land in controversy? If so, when and what was it?

Ans. None at all.

Int. 11. How far from the land described in interrogatory 3 do you reside, and how far from it have you resided during the time you have resided in the county, and how intimate have you been acquainted with it?

Ans. I live two (2) miles from said land. I only know it, as heretofore described, by passing by it.

Int. 12. As whose land has this been generally known and designated in the neighborhood and for how long?

Ans. I cannot state.

Int. 13. Are you acquainted with the value of farming lands in the vicinity of this land, and for how long have you been acquainted with such values?

79 Ans. I have some knowledge and have had of the values of lands since my residence in the county.

Int. 14. If you say you are and have been acquainted with the value of lands in the vicinity of the land in question, state what would be a fair market value of this land in 1860 and from that time up to the year 1877.

Ans. In 1860 the land was worth but little above Government price, $1.25 per acre; in 1877 it was worth from $10.00 to $15.00 per acre.

Int. 15. What would be a fair market value for it from 1877 to the year 1885?

Ans. From $15.00 per acre to $20.00 per acre.

Int. 16. What would be a fair market value for the land in September, 1888?

Ans. Near or quite $100.00 per acre.

Int. 17. If the value given by you of the land in 1888 is higher than those of previous years, state about at what time the value of the land commenced to increase, and state, if you know, any matters and things that occurred or occurring which raised or tended to increase its value.

Ans. Its value began to increase about 1887, by reason of the location and building of the railroad bridge across the river near it and the platting of a town—South Sioux City—north of it.

Int. 18. State fully about the condition of the land and its value since the year 1860.

Ans. It has been wild, unimproved land, and its value is as has been already stated.

KELLY W. FRAZER.

Also JAMES P. TWOHIG, who, being by me first duly sworn, testified as follows, to wit:

Int. 1. State your name, age, place of residence, and occupation.

Ans. My name *of* James P. Twohig; I am 26 years old; I
80 live in Dakota City, Dakota county, Nebraska; my occupation is county clerk of said county.

Int. 2. Are you the plaintiff in this action?

Ans. I am.

Int. 3. Have you in your possession or under your control either of the following original deeds for the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9) east, Dakota county, Nebraska; deed from Eugene L. Wilbur and wife to William F. Lockwood, dated March 2nd, 1860, and recorded on the 3rd day of March, 1860; deed from W. F. Lockwood and wife to James W. Virtue, dated 6th of February, 1861, and recorded the 22nd day of March, 1861?

Ans. I have not.

Int. 4. Have you in your possession or under your control the original deed made by James W. Virtue and wife to Mary A. Lockwood for the undivided one-half (½) of the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9) east, dated the 3rd day of February, 1863, and recorded March 5th, 1863?

Ans. No, sir.

Int. 5. Have you the original deed made by James W. Virtue to you for the land in controversy, dated September 3rd, 1888? If so, please attach the same to your answer.

Ans. Yes, sir.

Deed marked Exhibit A and made a part hereof.

EXHIBIT A. Geo. H. Fair, Com.

81 *Quitclaim Deed.*

Know all men by these presents: That James W. Virtue and A. M. Virtue, his wife, of Baker county and State of Oregon in consideration of the sum of thirteen hundred and fifty (1350) dollars in hand paid by J. P. Twohig of Dakota county, and State of Neb., do hereby quitclaim unto the said J. P Twohig all our right, title and interest in and to the following-described premises situated in the county of Dakota and State of Nebraska, to wit:

The west one-half of the northeast quarter of section thirty-three (33) township twenty-nine, range 9, east and W. ½ N. E. and lots 3 and 4 sec. 3, 28, 9, twenty-eight, nine and the S. ½ N. W. sec. 3, 28, 9 all in Dakota county Nebraska, and the following-described lots in Dakota City, Nebraska:

Lot.	Block.
2	66
3	67
2, 6, & 13	69
9	72
7, 14, & 15	74
9	76
4	77
6	84
5	85
7	86
18	87
15	88
9	90
17	91
3 & 18	92
5	93
9	94
10	95
2 & 5	112
1 & 5	113
3 & 4	114
5	115
2	117
4	119
6 & 10	120
1 & 4	121
8	122
18	123
1 & 4	124
10 & 12	125
7	126
82 2	127
9	135
5, 9, & 12	136
2 & 6	138
11	139
4	140
3, 11, 12	142
9, 10, 11, & 12	143
7	145
3, 7, 12	146
5	147
4	165
5	166
1, 4, 7, 8	171
9, 11, 12	171
10	172
4, 5, 12, 15	174
4, 10	176
1, 5	177
1 & 9	178
4	179
6, 9, 12	184
13, 17	184
3	185
16	187
1, 8	189
3, 10	190
10	193
8	194
2 & 6	196
7, 11	197
5	218
14	219
1 & 6	220
7, 10, 11	221
1, 3, 4, 6	222
7, 15, 17	222
7	223
2, 6, 8	224
2, 7	225
1, 17, 18	226
7	233
10	237
5	239
1 & 2	240
2 & 4	241
6, 11	241
9, 14, 16	242
2 & 8	243
9	244
5	245
6	269
2, 5, 9	270
8	271
3, 11	272
2	273
4	274
4	275
1	276
4	277
4, 8, 11	279
2, 8, 10	280
6, 2	138

I also quitclaim all lands and lots that may be omitted in this deed hereby quitclaimed to James P. Twohig all my interest in Dakota Co. Neb.

And the said A. M. Virtue hereby relinquishes her right of dower in and to the above-described premises.

Signed the 3rd day of September A. D. 1888.

JAMES W. VIRTUE.
A. M. VIRTUE.

In presence of
L. V. HARDY,
E. H. MIX.

STATE OF OREGON, } *ss:*
Baker County, }

On the third day of September, A. D. 1888, before me, E. H. Mix, a county clerk within and for said county, personally came J. W. Virtue & A. M. Virtue, his wife, personally to me known to be the identical persons whose names are affixed to the above instrument as grantors, and severally acknowledged the execution of the same to be their voluntary act and deed for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at Baker City, Oregon, on the date last above written.

E. H. MIX, [SEAL.]
County Clerk.

Endorsed: Virtue to Twohig. State of Nebraska, Dakota county, *ss:* Filed for record on the 22nd day of Sept., A. D. 1888, at 9 o'clock a. m., and recorded in Book S, on page 159. J. P. Twohig, clerk. Paid.

83 Cross-interrogatories:

Int. 1. How long have you resided in Dakota county and in what portion of the county have you resided?

Ans. I have lived in Dakota county 26 years; I have resided in Dakota City for the last four years; most of the other 22 years I lived in the northwest part of the county.

Int. 2. Do you hold any official position in Dakota county, Nebraska; and, if so, what?

Ans. Yes; I am county clerk.

Int. 3. Have you had any correspondence with any of the defendants in this action? If so, when did the correspondence commence and who wrote the first letter?

Ans. I had a letter from a man in Ohio, who signed his name "Harter." I do not remember when the correspondence commenced, but it was about a year ago. I think I wrote the first letter.

Int. 4. Have you in your possession or under your control any letters received by you from Isaac W. Harter or any of the other defendants in this action?

Ans. I have not.

Int. 5. If in answer to the 4th cross-interrogatory you state you have such letters or that they are under your control, will you produce the same to the commissioner taking your evidence and have the same identified as a part of your deposition as an exhibit?

Ans. I have not any letters.

Int. 6. Are you personally acquainted with either William L. Lockwood, Mary A. Lockwood, his wife, or James W. Virtue? If so, for how long — time have you been personally acquainted with either?

Ans. I am personally acquainted with James W. Virtue, and first knew him about June 30th, 1888. I do not know the other parties, William F. Lockwood and Mary A. Lockwood, personally.

JAMES P. TWOHIG.

84 Also, on the 28th day of October, 1889, E. L. WILBUR, who, being first duly sworn, testified as follows, to wit:

Int. 1. Please state your name, age, place of residence, and occupation.

Ans. E. L. Wilbur. I am 54 years old.

Int. 2. How long have you lived in Dakota county, Nebraska?

Ans. I came here in the fall of 1856, 33 years ago; have lived here since. My residence is in Dakota county, Nebraska. My occupation is farming.

Int. 3. Are you acquainted with the west half (½) of the northeast quarter (¼) of section thirty-three (33), township twenty-nine (29), range nine (9); and, if so, how long have you known it?

Ans. Yes, I know the land. I pre-empted it in about 1858 and have known it ever since.

Int. 4. What opportunity have you had to see said land and during what period of time?

Ans. I have lived in sight of it most of the time since I entered it and have travelled over it every few days.

Int. 5. Please state whether or not said land or any part of it has been improved in any way or occupied in any way since you have known it.

Ans. It has never been improved or occupied since I left the place, in the fall of 1858. It is lying open and not fenced.

Int. 6. During the time you have known said land has any one been in the actual possession of said land?

Ans. Not to my knowledge. There has not been anybody there claiming the land.

Int. 7. State what has been the character of the said land since you have known it, as to its being unimproved, wild land, or otherwise.

Ans. It is now and has since I have known it been unimproved, wild land—never fenced, plowed, or improved in any way.

85 Int. 8. Has it ever been fenced or enclosed in any way since you have known it?

Ans. No.

Cross-interrogatories:

Int. 1. Where you acquainted with William F. Lockwood or Mary A. Lockwood or with James W. Virtue or with either of them? If not with all of them, with which were you acquainted?

Ans. I knew William F. Lockwood and James W. Virtue. I did not know Mary A. Lockwood.

Int. 2. If you answer that you were acquainted with them or either of them, state when and for how long you knew each of them.

Ans. I knew James W. Virtue from 1858 until he left this county in 1862 or 1863. I knew William F. Lockwood from 1858 until he left the county, in 1866 or 1867.

Int. 3. Where were the said William F. Lockwood and James W. Virtue living when you were acquainted with them?

Ans. In Dakota City, Dakota county, Nebraska.

Int. 4. Did William F. Lockwood and James W. Virtue ever live in Dakota county, Nebraska; and, if so, where in said county did they reside, and whether they reside in said county now or not?

Ans. They both lived in Dakota county, in Dakota City, and neither of them live in said county now.

Int. 5. If you say that either Wm. F. Lockwood or James W. Virtue or both resided in Dakota county and neither or either do not reside in said county, state as near as you can when each removed from the county.

Ans. James W. Virtue left Dakota county before 1865, and Wm. F. Lockwood — Dakota county before 1870. I don't know the exact time.

Int. 6. State, if you know, where each removed to and where each now resides.

Ans. I do not know where they went to from here. Wm. F Lockwood now lives near Toledo, Ohio, and James W. Virtue lives in Oregon.

86 Int. 7. State all you know of the residence and whereabouts of both William F. Lockwood and James W. Virtue since they ceased to be residents of Dakota county.

Ans. I have told all I know.

Int. 8. Do you know of either Wm. F. Lockwood or James W. Virtue being back in Dakota county since they ceased to reside there; if so, when, and how long did they remain?

Ans. J. W. Virtue was in this county in the summer of 1888 and remained about a week. Wm. F. Lockwood has not been back, to my knowledge.

Int. 9. Do you know whether either Wm. F. Lockwood or James W. Virtue had any person as an agent in Dakota county or any one attending to their or either of their business after they left the county; if so, who was it, and how long did such person continued to act for them, to your knowledge?

Ans. I don't know of any such person.

Int. 10. If you know of any such person, do you know such person ever making any claim or exercising any rights or doing anything with the land in controversy; if so, when, and what was it?

Ans. I do not know of any such person.

Int. 11. How far from the land described in interrogatory 3 do you reside, and how far from it have you resided during the time you have resided in the county, and how intimate have you been acquainted with it?

Ans. I resided about one and one-fourth miles from it; have lived near the land all the time, except about 20 months. I have seen it almost every day that I have lived in the county.

Int. 12. As whose land has this been generally known and designated in the neighborhood, and for how long?

Ans. It hasn't been called anybody's land; it is called the "common," and is so known all around.

87 Int. 13. Are you acquainted with the values of farming lands in the vicinity of this land, and for how long have you been acquainted with such values?

Ans. I have been acquainted with the values of farm lands in this vicinity ever since I have lived there.

Int. 14. If you say you are and have been acquainted with the values of lands in the vicinity of the land in question, state what would be a fair market value of this land in 1860 and from that time up to the year 1877.

Ans. In 1860 the land was worth about $100.00, in 1877 the land was worth about $10.00 or $12.50 per acre.

Int. 15. What would be a fair market value for it from 1877 to the year 1885?

Ans. In 1885 it was worth about $20.00 per acre.

Int. 16. What would be a fair market value for the land in Sept., 1888?

Ans. The land was worth, I think, $100.00 per acre at a fair value. There was some adjoining it sold for $150.00 per acre.

Int. 17. If the value given by you of the land in 1888 is higher than those of previous years, state about at what time the value of the land commenced to increase, and state, if you know, any matter and thing occurred or occurring which raised or tended to increase its value.

Ans. The value began to increase in the spring of 1887. The increase was caused by the platting of a town near it and the constructing of the railroad bridge across the river at Sioux City.

Int. 18. State fully about the condition of the land and its value since the year 1860.

Ans. I know of nothing more than I have already stated.

E. L. WILBUR.

88 STATE OF NEBRASKA, } ss:
Dakota County, }

I, Geo. H. Fair, do hereby certify that in pursuance of the notice hereto attached and directed to any *any* notary public in and for Dakota county, Nebraska, I caused James P. Twohig and Kelly W.

Frazer to come before me on the 4th day of October, 1889, at Dakota City, and I caused E. L. Wilbur to come before me on the 28th day of October, 1889, and said witnesses were then and there by me duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause and then examined by me upon the interrogatories attached to said writ, and said examination was reduced to writing by me and was by said witnesses subscribed in my presence, which examination and all of the same is now herewith returned.

In witness whereof I have hereunto set my hand and official seal the 28th day of October, 1889.

[SEAL.] GEORGE H. FAIR,
Notary Public.

Fees.

K. W. Frazer, 1 day, 1.00, no miles	$1 00
E. L. Wilbur, 1 day, 1.00, 5 "	1 50
Sheriff	1 25
Geo. H. Fair, com.	4 00

Upon the back of said deposition appear endorsements in words and figures following, to wit: No. 3, N. In the United States circuit court within and for the district of Nebraska. James P. Twohig, pl'ff, *vs.* George D. Harter *et al.*, def'ts. Depositions of witnesses on the part of the plaintiff. Received and filed Oct. 30th, '89, and opened by order of court Nov. 27, 1889. E. D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 23rd day of June, 1890, the following proceedings were had and done in said cause, as appears of record on folio 625, Journal "O," of said court, to wit:

TWOHIG
vs.
HARTER *et al.*

89 Referred to clerk to report facts, &c., without delay.
(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 28th day of June, 1890, finding of facts was filed in said case: which said finding of facts is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
ISAAC HARTER and GEORGE D. HARTER *et al.*, Defendants. } Finding of Facts.

In pursuance and by virtue of an order of said court, made in the above-entitled cause and bearing date the 23rd day of June, 1890, by which it was referred to the undersigned, Elmer D. Frank,

clerk, to ascertain and find the facts in the said cause, as shown by the evidence therein taken, and to report the same to said court, I, the subscriber, Elmer D. Frank, clerk, do respectfully certify and report that, upon examination, I find the facts in the said cause to be as follows:

The land in controversy in this suit is the undivided one-half of the west half of the northeast quarter of section thirty-three (33), township twenty-nine (29), in range nine (9) east.

That on the 27th day of February, 1858, Eugene L. Wilbur was the owner of the west half of the northeast quarter of sec. 33, township 29, range 9 east, and on that day made and delivered to Isaac Harter, now deceased, his promissory note for the payment of one hundred and forty dollars ($140) in twelve months, which, if not paid when due, was to bear interest, at the rate of four per cent. per month, from maturity. To secure the payment of this note Wilbur executed and delivered to Augustus Kountze a trust deed of the same land of even date with the note; that no part of this note, either principal or interest, has ever been paid.

That in the 2nd day of March, 1860, Eugene L. Wilbur and
90 his wife, the owners of the said west half of the northeast quarter, etc., by quitclaim deed conveyed the same to Wm. F. Lockwood, which deed was duly recorded in the office of the county clerk of Dakota county on the 3rd day of March, 1860; that afterwards, on February 6, 1861, the said Lockwood and wife by warranty deed conveyed said premises to James W. Virtue, which deed was duly recorded in the same office on the 22nd day of March, 1861; that afterwards, on the 3rd day of February, 1863, the said Virtue, by warranty deed conveyed an undivided one-half interest in the said land to Mary A. Lockwood, which deed was duly recorded on March 5, 1863; that afterwards, on the 3rd day of September, 1888, the said Virtue by quitclaim deed conveyed an undivided one-half of the said land to the plaintiff herein, James P. Twohig, which deed was duly recorded on Sept. 22, 1888, and which deed described the premises which are the subject-matter of this suit.

No part of the note above referred to has ever been paid, and that on February 27, 1876, Isaac Harter, the payee in said note, died, and that the defendants herein are the heirs-at-law of the said Isaac Harter. On the day after his death there was begun in the district court of Dakota county a suit to foreclose the said west half of the northeast quarter of section 33, township 29, range 9 east, the same being the land included in the trust deed made to Augustus Kountze above referred to; that in this suit the only defendants were William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze; that this suit was brought in the name of the said Isaac Harter, the petition being filed one day after his death, and that service therein was had on the defendants by publication, the petition therein being verified by Herman Kountze, as the agent of the said Isaac Harter, the petition being so verified on February 21, 1876, and was signed by Isaac Powers, Jr., the attorney for plaintiff, or more accurately for Isaac Harter before his death; that this

suit of foreclosure was prosecuted to final decree in the *the*
91 name of Isaac Harter, notwithstanding his death before the petition being filed, and no steps were ever taken to have the proceedings carried on in the name of his representatives or heirs-at-law; that finally, a foreclosure being allowed, a sheriff's deed to the said land was made to and in the name of the said Isaac Harter, then dead, dated May 10, 1877, and that the said sheriff's deed was caused to be recorded by some of the heirs of Isaac Harter on the 1st day of June, 1877.

That the said suit in foreclosure was brought to foreclose the entire west half of the northeast quarter of section 33, etc., and that at that time James W. Virtue, the grantor of plaintiff herein, had a legal record title to an undivided half of the said land, but was not made a party to the said suit. The proceedings in the said foreclosure suit are attached to this report.

I find that the land in controversy is situated in Dakota county, Nebraska, and has never been in the manual possession of either the plaintiff or his grantors or in any of the defendants, or in that of Isaac Harter, deceased; that it is and has been ever since the said Isaac Harter received the said note and the said trust deed was made open, unfenced, unimproved, and wild land.

That William F. Lockwood and his wife lived in Dakota county, Nebraska, from 1858 until about 1852 or 1863, when they removed to Ohio, where they are now living; that James W. Virtue resided in the said county from about the first-named year, but removed therefrom some time in the year 1863 or 1864, going to Washington Territory, where he has since resided.

There is no testimony whatever to show that either Lockwood or his wife have ever since returned, ever for a time, to the said county, and several residents thereof, acquainted with them, testified that to the best of their knowledge and belief the Lockwoods have never returned to the said county since the date of leaving.

There is no testimony to show that James W. Virtue ever
92 returned *returned* to the said county after his removal therefrom, prior to the summer of 1888, when he spent a week at Dakota City. It was at this time that the plaintiff herein first met and became acquainted with the said Virtue and obtained a deed to the premises in dispute from him.

I find that at the time the trust deed was given to Augustus Kountze the land in controversy was worth somewhere between $1.25 and $5 an acre, the pre-emptor of the 80 acres testifying in this case that at that time the whole was not worth more than $100; that in 1877 the said land was worth from $10 to $15, in 1885 from $15 to $25, and that in 1887 and 1888 its value rapidly and materially increased—this before the deeding of the land in controversy to the plaintiff herein; that this sudden increase was due to the construction of a railroad bridge across the Missouri river near to the said land and the platting of a town—South Sioux City—in its neighborhood, and that at the time of the making of the deed to the plaintiff herein the value of the land in controversy was any-

where from $100 to $150, testimony being given that land adjacent to it sold for $150 an acre about that time.

I further find that the consideration received by Eugene L. Wilbur for the quitclaim deed to the west half of the northeast quarter, etc., to William Lockwood was $40 in cash and property valued at $25, and that the consideration given by the plaintiff herein to the said Virtue for the conveyance to him of an undivided half in this land was $350.

I find that Isaac Harter during his lifetime paid and discharged all the taxes levied and assessed against the said west half, etc., up to and including the year 1874: that from that time up to and including the taxes for the year 1888 all the taxes levied and assessed upon this land has been paid by these defendants, and attach
93 hereto a statement showing the amount of such taxes and the time they were paid.

I find from the uncontradicted testimony of Thomas L. Griffey, a resident of Dakota City, in said county, since 1857 for a long time, but now residing in Sioux City, that he was engaged in the practice of law and real-estate business in said Dakota City and county for a great many years, and that he frequently transacted business with and for the Lockwoods and James W. Virtue; that when Virtue left Dakota City he placed his business matters with Kountze Bros., at Omaha, and that the said Griffey attended to his matters or some of them under their direction; that after the leaving of Virtue he received from Kountze Bros. directions and instructions regarding some eleven lots in Dakota City, so late as June 20, 1877; that the said lots stood in the name of Augustus Kountze until that time, but that they were Virtue's lots, and that by Kountze's direction the said Griffey paid taxes upon them until that time, the said Griffey testifying and not being contradicted that, so far as he knows, neither Lockwood nor Virtue left directions with any one else to look after any property in the said city and county, no part of the said lots being any part of the property in dispute.

I find that there is no testimony whatever tending to show that James W. Virtue, the grantor of the plaintiff herein, at any time after his departure from said city and county in any way exercised or claimed any rights of property in regard to said land in controversy, and that the first intimation that the defendants had as to the claim of the plaintiff herein, who has succeeded to the right of Virtue, was after the return of Virtue to Dakota City and the giving of the deed by him to the plaintiff.

I further find that about the time of Virtue's return, probably before it, Isaac Harter, the legally appointed administrator of the estate of the said Isaac Harter, dec'd, made an affidavit in Stark county, Ohio, to the effect that the said Isaac Harter had
94 died on February 27, 1876, and that a copy of this affidavit was enclosed to Isaac Harter, administrator, in a letter to him from the plaintiff herein, by which letter the said defendants or any of them for the first time learned that their title to this land, obtained through the foreclosure proceedings, was disputed, and that

this affidavit was made for the purpose of assuring purchasers of other lands owned by the defendants through their father, the said Isaac Harter, deceased, that he had left no debts unpaid.

I further find that the only testimony in the case going to show possession of the land in controversy is that given by Isaac Harter, administrator, one of the defendants, who testifies that they have repeatedly since the death of their father offered the land for sale in Dakota county, and have received several offers for it, the times and the nature of which are not stated.

I further find up to and including the years 1865 the land was assessed and taxed in the name of Eugene L. Wilbur. In the year 1866 it was assessed and taxed in the name of no person. From 1867 to 1877, both inclusive, it was assessed and taxed in the name of Isaac Harter, and from 1878 to 1885, both inclusive, it was assessed and taxed in the name of Isaac Harter, Jr. From 1886 to 1889, both inclusive, it was assessed and taxed in the name of Henry W. Harter, and was so carried out and shown upon the assessment and tax-rolls of Dakota county, Nebraska.

I further find that the petition for foreclosure in the suit above referred to set up no claim for taxes which had been paid upon this land by Isaac Harter, dec'd, for the numerous years before the bringing of such suit.

I further find that the plaintiff herein is the county clerk of Dakota county, Nebraska, in which county the land in controversy lies.

I further find that correct copies of the proceedings in foreclosure in the district court in and for Dakota county, Nebraska, in
95 the case of Isaac Harter against William F. Lookwood *et al.* are found on pages 8 to 27, both inclusive, of the documents in this case marked "Stipulation and Testimony."

That the entire taxes paid upon the W. ½ of the N. E. ¼ of sec. 33, twp. 29, etc, of which the land in controversy is an undivided half, are set forth and enumerated year by year on page 4 of the stipulation and testimony contained in the files herein.

All of which is respectfully submitted.

ELMER D. FRANK, *Clerk.*

Dated at Omaha, this 28th day of June, A. D. 1890.

Upon the back of said finding of facts appear endorsements in words and figures following, to wit: No. 83, N. In the circuit court of the United States, dist. of Neb. James P. Twohig *vs.* Isaac Harter *et al.* Finding of facts. Filed Jun- 28, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, at the May term of said court, on the 1st day of July, 1890, the following proceedings were had and done in said cause, as appears of record on folio 652, Journal "O," of said court, to wit:

TWOHIG
vs.
HARTER *et al.* } In Chancery. Bill to Redeem.

I hold that the decree in the State court which ordered a sale of the mortgaged premises in dispute is absolutely void, as the plaintiff therein was dead before the suit was commenced, and nothing was therein done by any legal representatives of the deceased pl'ff.

Neither pl'ff, def'ts, or their ancestors or grantors were ever in actual possession of the land, so the statute of limitations does not apply.

The plaintiff's grantor, Virtue, was not made a party def't in the foreclosure case, so in any event he ought to be permitted to redeem,
as he and def'ts are all non-residents of this State and have
96 been for many years. The defendants and their ancestor
have paid a large amount of tax on the land. The case will be again referred to the clerk, with directions to ascertain the amounts of taxes paid, dates of payment, &c., computing interest thereon from date of payment to date of report.

Also to compute interest on the $140 debt secured by mortgage. Compute same at 4 per cent. per month and also at 12 per cent. per annum, keeping the sum totals in each instance separate.

Also to show present value of the land in dispute. Either party may take further proof on these points within next 20 days if desired.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 17th day of July, 1890, stipulation was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States in and for District of Nebraska.

JAMES TWOHIG, Com.,
vs.
ISAAC HARTER *et al.* } Stipulation.

It is stipulated and agreed by and between the parties hereto that under the order and judgment of this court made July 1st, 1890, allowing the parties to make further proof as to the value of the land in controversy, that the value of the said land is two hundred dollars per acre, making the sum of eight thousand dollars for the undivided one-half in controversy with the plaintiffs in this action and sixteen thousand dollars for the eighty acres claimed by the defendant-.

JAY BROS.,
C. J. WRIGHT, &
W. C. GANTT,
Att'ys for Complainant.
J. H. & C. M. SWAN,
Att'ys for Def'ts.

Upon the back of said stipulation appear endorsements in
97 words and figures following, to wit: No. 3, N. Circuit court of United States. James Twohig, comp., *vs.* Isaac Harter *et al.* Stipulation. Filed Jul- 17, 1890. Elmer D. Frank, clerk.

Thereupon, afterwards, to wit, on the 31st day of July, 1890, supplemental report & finding of facts were filed in said case; which said supplemental report and finding of facts are in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
ISAAC HARTER *et al.*, Defendants. } Supplemental Report and Finding of Facts.

In pursuance and by virtue of an order of the said court made on July 1st, 1890, by which the above-entitled cause was referred to the undersigned, Elmer D. Frank, clerk of the said court, to ascertain the amount of taxes paid by defendants or those under whom they claim on the lands in dispute and the interest thereon, and to ascertain the present value of the lands in controversy, and to compute interest on the $140.00 note, upon which the foreclosure proceedings in the State court were based, both at the rate called for on the face of the note—that is, 4 per cent. per month—and also at the rate of 12 per cent. per annum, and to report thereon to the said court, I, the subscriber, Elmer D. Frank, clerk, do respectfully certify and report:

1st. I find that the value of the land claimed by the plaintiff herein is the sum of eight thousand ($8,000) dollars, or two hundred dollars ($200) per acre, the parties hereto having stipulated to that effect since the order of reference by the court.

2nd. I find that the following taxes had been paid by the defendants or their father, Isaac Harter, under whom they claim, on the west half of the northeast quarter of section thirty-three (33), an undivided half of which is the land claimed by the plaintiff herein.

98 The subjoined table shows in the different columns the years for which the taxes were paid, the dates of payment, the amount, and the interest thereon from the date of payment up to the date of this report, both at 7 per cent. and at 10 per cent. per annum:

Tax year.	Date of pay't.	Am't p'd.	Int., 7%.	Int.,10%.
1861	No date	$5 02	$10 36	$14 78
1862	No date	4 20	8 29	12 00
1863	Dec. 28, '63	4 49	7 23	11 96
L864	Feb. 17, '65	4 14	7 38	10 43
L865	Jan. 19, '66	7 30	12 57	18 80
1866	Feb. 4, '67	7 90	12 92	18 57
1867	Dec. 2, '67	5 60	8 84	12 68
1868	Feb. 19, '69	6 54	9 86	14 00
1869	Apr. 12, '70	10 04	14 20	20 30
1870	Mar. 20, '71	16 56	22 46	31 96
1871	Jan. 10, '72	22 70	29 40	42 11
1872	Feb. 10, '73	14 00	17 12	24 46
1873	Jan. 21, '74	21 35	24 75	35 20
1874	Apr. 28, '75	26 00	27 75	39 65
1875	Apr. 22, '76	19 91	19 85	28 41
L876	Apr. 26, '77	25 71	23 85	34 05
1877	Mar. 11, '78	19 95	17 35	24 78
1878	Mar. 20, '79	14 40	11 36	16 36
1879	Feb. 10, '80	13 00	9 52	13 62
1880	Jan. 20, '81	22 54	15 00	21 50
1881	Feb. 4, '82	15 05	8 93	12 75
1882	Jan. 2, '83	16 02	8 50	12 13
1883	Jan. 12, '84	18 95	8 62	12 43
1884	Dec. 30, '85	29 12	9 31	13 32
1885	Dec. 19, '86	13 10	3 31	4 73
1886	Dec. 18, '87	19 00	3 48	4 97
1887	Jan. 20, '88	76 00	13 44	19 20
1888	Jan. 1, '89	52 80	5 87	8 36
		511 39	371 52	523 51

This, then, gives, including principal and interest at 7 per
99 cent. upon all payments of taxes paid by the defendants or those under whom they claim up to the date hereof upon the entire west half of the said northeast quarter, the sum of eight hundred and eighty-two and $\frac{91}{100}$ ($882.91) dollars, while with the same principal and interest at ten per cent. per annum the result is one thousand and thirty-four and $\frac{90}{100}$ dollars ($1,034.90).

The plaintiff claims in this suit an undivided half of the west half, &c. Dividing the above amounts by two, on the theory that each undivided half should bear an equal division of the taxes paid upon the entire west half of the northeast quarter, we have this result:

Taxes paid on land claimed by plaintiff, with interest thereon at seven per cent. $441 45

Taxes paid by the defendants on the same land, with interest at ten per cent. $517 45

3rd. I find that the principal debt of the note given by Eugene L. Wilbur on Feb. 27, 1858, to Isaac Harter and secured by a mortgage of the west half of the northeast quarter, etc., with interest thereon at the rate of four per cent. a month, the rate called for by the note, computed up to the date of this report, is the sum of two thousand four hundred and eighteen and $\frac{40}{100}$ dollars (2,418.40), of which amount $2,278.40 is interest.

The same note, principal and interest, the latter being allowed for at the rate of twelve per cent. per annum, would to-day amount to the sum of six hundred and eighty-four and $\frac{60}{100}$ dollars ($684.60), of which amount $544.60 is interest.

All of which is respectfully submitted.

ELMER D. FRANK, *Clerk.*

Dated at Omaha this 31st day of July, 1890.

Upon the back of said report appear endorsements in words and figures following, to wit: No. 3, N. Circuit court of the U. S., dist. of Neb. James P. Twohig *vs.* Isaac Harter *et al.*

100 *Supplemental Report and Finding of Facts. Filed Jul-* 31, 1890. *Elmer D Frank, Clerk.*

Thereupon, afterwards, to wit, at the November term of said court, on the 11th day of November, 1890, the following proceedings were had and done in said cause, as appears of record on folio 829, Journal "O" of said court, to wit:

JAMES P. TWOHIG }
vs.
ISAAC HARTER *et al.* }

Now, at this time, came plaintiff and asked leave to file supplemental bill, setting up his title to the other undivided one-half of the land described in the original bill, which leave is hereby granted, and the plaintiff is given fifteen days to file said supplemental bill; and, by consent of parties, it is ordered that the answer filed in said action to the original bill of complaint shall stand and be an answer also to said supplemental bill when filed and the replication of plaintiff to answer also taken and considered as applying to said answer.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 20th day of November, 1890, supplemental bill was filed in said case; which said supplemental bill is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Plaintiff, *vs.* GEORGE D. HARTER, M. D. HARTER, ISAAC Harter, Henry W. Harter, Louise Harter, Intermarried with Albert L. Ordean, and Isaac Harter, Administrator of the Estate of Isaac Harter, Deceased, Defendants.	Supplemental Bill to Amended Bill in Equity.

To the honorable the judges of the circuit court of the United States in and for the district of Nebraska:

101 The plaintiff, James P. Twohig, a resident and citizen of the State of Nebraska, by leave of court files this his supplemental bill to his amended bill of complaint against George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Harter, intermarried with Albert L. Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, all residents and citizens of the State of Ohio.

And thereupon complainant states that on the 27th day of December, 1888, the complainant herein filed his original bill in the district court of Dakota county, Nebraska, and that thereupon and within the proper time said respondents removed said cause to this court, and after said removal, by stipulation of parties, said original bill was amended in this, to wit, to show that Isaac Harter, deceased, died on the 27th day of February, 1876, and before the action was commenced in the district court of Dakota county for the foreclosure of the deed of trust set out and described in said bill.

Complainant states to the court that said original and amended bill prayed that the decree entered in the case brought in the district court of Dakota county might be set aside and complainant be allowed to redeem the undivided one-half interest in the lands set out and described in said original and amended bill upon the payment to respondents of the amount legally and equitably due them on the deed of trust set out and described in *in* said original and amended bills.

Complainant states that respondents, having been duly served with process in said case, appear*ing* and filed their answer to said original and amended bill, and complainant replied to the said answer, and the evidence was taken and the case submitted to the court, and the court found in favor of the complainant, and that the proceedings had in the district court of Dakota county were ab-

102 solutely void and of no effect, and that this complainant had the right to redeem the undivided one-half of the west half of the northeast quarter of section 33, township 29, range 9 east, from the lien of respondents' deed of trust upon the same upon paying to them the amount due them thereon; also upon the payment of the sums paid as taxes upon said described lands by said respondents, but no decree has been as yet entered upon said findings.

Complainant further states that since the filing of the bill as aforesaid he has become the owner of the other undivided one-half interest in said described land and now is and ever since on or about the 28th day of January, 1889, — the sole owner of the west half of the northeast quarter of section 33, township 29, range 9 east, and as such owner is entitled to redeem the whole of said described land from the lien of said deed of trust.

Wherefore complainant prays that the decree of the district court of Dakota county and the deed based thereon may be set aside and complainant be allowed to redeem upon paying the respondents the amount legally and equitably due them, and complainant's title to the whole of said described lands covered by said deed of trust be quieted in him.

DAVIS AND GANTT,
Attorneys f-r Complainant.

STATE OF IOWA, }
Woodbury County, } *ss:*

James P. Twohig, being first duly sworn, deposes and says that he is the complainant above named; that he has heard read the foregoing supplemental bill and is acquainted with the contents thereof, and that the facts therein set forth are true, as he verily believes.

JAMES P. TWOHIG.

Subscribed in my presence and sworn to before me this — day of November, A. D. 1890.

[SEAL.] WM. E. DAVIS,
Notary Public.

103 Upon the back of said supplemental bill appear endorsements in words and figures following, to wit: No. 3, N. In the circuit court of the United States, district of Nebraska. James P. Twohig, plaintiff, *vs.* Geo. D. Harter *et al.* Supplemental bill to amended bill in equity. Filed Nov. 20, 1890. Elmer D. Frank, clerk. Davis, Gantt & Keatley, att'ys for plaintiff.

Thereupon, afterwards, to wit, on the 20th day of January, 1891, petition for injunction was filed in said case; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Pl'ff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. Harter, Louise Harter, Intermarried with Albert M. Ordean, *et al.*, Def'ts.

To the honorable circuit court of the United States in and for the district of Nebraska:

Your petitioners, George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Harter, intermarried with Albert N. Or-

dean, *et al.*, defendants in the above-entitled action, would respectfully show to this court:

1. That they are the defendants in the above-entitled action, which is now pending before this court, and no final decision or decree has been rendered therein, as will more fully appear by reference to the proceedings and files of this honorable court.

2. That these defendants claim to be the owners of the west half of the northeast quarter of section thirty-three (33), township twenty-nine (29), range nine (9), in the county of Dakota and State of Nebraska, in which the ownership is being litigated in this suit between plaintiff and these defendants; that upon the said premises there is a large amount of valuable timber, which adds materially to the value of the said property.

104 3rd. That the plaintiff is committing waste upon the said premises and is cutting down and hauling away the timber and trees from the said premises and is materially damaging the value of said premises by cutting and carrying off the said timber therefrom and selling the same; that the said timber so cut and destroyed is not used upon the said premises, but is appropriated to the use and benefit —, to the serious damage of these defendants; that under the issues and the rulings of this court, as far as the said action has progressed, these defendants are entitled to a large reimbursement for their lien and taxes paid upon the said premises, which remain and constitute a lien thereon in any event, and the said timber so being cut and carried away constitute- a material part of their security for said reimbursement.

4. That your petitioners are informed and verily believe that unless the said plaintiff is restrained by an order from this court that he will, before the final decision of said cause, have taken and carried away the valuable timber now upon the said premises and which is a material part of the value thereof, and will damage and injure the said premises; that your petitioners have no other or proper redress for the protection of the said property while the ownership of the same is being litigated in this court other than by calling upon the said court for its protection of the said property during the said litigation.

Wherefore your petitioners ask that a writ of injunction may issue enjoining and restraining the said plaintiff from cutting and carrying away any timber or valuable trees from the said premises until the final hearing of this cause, determining the rights between the respective parties thereto, and until further order of this court therein.

J. H. & C. M. SWAN,
Solicitors for Defendants, Petitioners.

105 STATE OF NEBRASKA, } *ss:*
County of Dakota, }

J. N. Hamilton, being duly sworn, says that he is a resident of Dakota county, State of Nebraska; that he is acquainted with the west half of the northeast quarter of section thirty-three (33), town-

ship twenty-nine (29), range nine (9), being the property in litigation between James P. Twohig, complainant, and Geo. D. Harter *et al.*, defendants, in the circuit court of the United States for the district of Nebraska; that he lives within 3 miles of the said land; that he knows the contents of the foregoing petition; that he has authority from the said defendants to look after and care for the said land, and has acted for the said defendants in so doing; that the allegations contained in the foregoing petition are true.

J. N. HAMILTON.

Sworn to before me and subscribed in my presence by the said J. N. Hamilton this 15th day of January, A. D. 1891.

[SEAL.] GEO. H. FAIR,

Notary Public, of Nebraska, in and for Dakota County.

Upon the back of said petition for injunction appear endorsements in words and figures following, to wit: No. 3, N. In the circuit court of the U. S. in and for the dist. of Nebraska. James P. Twohig, plaintiff, *vs.* Geo. D. Harter, M. D. Harter, Isaac Harter, *et al.*, defendants. Petition for injunction. Filed Jan. 20, 1891. Elmer D. Frank, clerk. J. H. & C. M. Swan, attorneys for def'ts.

Thereupon, afterwards, to wit, at the January term of said court, on the 20th day of January, 1891, the following proceedings were had and done in said cause, as appears of record on folio 291, Journal "P" of said court, to wit:

JAMES P. TWOHIG
vs.
GEORGE D. HARTER *et al.*

Upon the petition of George D. Harter, Isaac Harter, Henry W. Harter, and Louise Harter, intermarried with Albert M. Or-
106 dean, defendants in the above-entitled case, and good cause being shown therefor, it is ordered by the court that on an undertaking being given in the sum of $1,000.00, with sureties to be approved, an injunction be allowed to issue herein, as prayed in said petition, enjoining the said plaintiff from cutting and carrying away any timber or valuable trees from the following-described property, to wit: The west one-half of the northeast quarter of section thirty-three, township twenty-nine, range nine, in Dakota county, Nebraska, until the further order of this court.

Thereupon, afterwards, to wit, on the 13th day of February, 1891, depositions were received and filed in said case and opened by order of court February 25, 1891, and said depositions are in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Plaintiff,
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. Harter, Louise Harter, Intermarried with Albert M. Ordean, *et al.*, Def'ts.

To the above-named plaintiff or Jay Bros., C. L. Wright, & W. E. Gantt, your attorneys of record:

You are hereby notified that on Tuesday, the 10th of Feb., A. D. 1891, the above-named defendants will in the above-entitled suit, at the law office of Clayton W. Everett, in the city of Toledo, county of Lucas, and State of Ohio, take the depositions of William F. Lockwood and Mary A. Lockwood, to be used as evidence on the trial of said suit and on the hearing of any and every motion and application therein. Said depositions will be taken because the testimony of said witnesses is necessary on the trial of said action and said witnesses live more than one hundred miles from the place of trial of said action, and the taking of said depositions
107 will be commenced at 10 o'clock a. m. of said day, and the taking of the same will be adjourned and continued from day to day, Sundays excepted, at the same place until the taking of the same is completed.

Dated this 15th day of January, A. D. 1891.

J. H. & C. M. SWAN,
Solicitors for Def'ts.

Service of the above notice is hereby accepted and issue of dedimus, filing of interrogatories, and all exceptions as to time are hereby waived this 13 day of January, A. D. 1891.

DAVIS & GANTT,
Attorneys of Record for Plaintiff.

Endorsed: No. —. In the circuit court of U. S. in and for dist. of Neb. Jas. P. Twohig, plaintiff, *vs.* Geo. D. Harter, M. D. Harter, Isaac Harter, *et al.*, defendants. Notice to take deposition-. J. H. & C. M. Swan, attorneys for def'ts.

Depositions taken before me, Arion E. Wilson, a notary public within and for the county of Lucas, State of Ohio, pursuant to the annexed notice, at the time and place therein specified, to be read in evidence on behalf of the plaintiff in an action pending in the circuit court of the United States of America in the district of Nebraska, in which James P. Twohig is plaintiff and George D. Harter and others are defendants.

Present: No one on behalf of plaintiff, and C. B. Winters, on behalf of defendants.

WILLIAM F. LOCKWOOD, of lawful age, being by me first duly sworn, as herein certified, deposes and says as follows:

Question 1. State your name, age, occupation, and place of residence.

Answer. My name is William F. Lockwood. I am 68 years of age. My occupation is attorney, and I reside in Put-in-Bay island, Ottawa, Co., Ohio.

Question 2nd. Have you formerly resided in Dakota county, State of Nebraska; and, if so, — your occupation while there, and
108 what length of time did you reside there?

Answer. Yes; attorney and judge of the Federal courts of the Territory, and resided there 10 years, from the year 1856 to 1866.

Question 3rd. What year did you leave there?

—. I ceased to reside there in 1866.

Question 4th. At the time you left Dakota county what intention did you have, if any, to return again?

Answer. When I left there it was not my intention to return again to Nebraska as a residence.

Question 5th. Since 1866 have you ever resided in Dakota county, Nebraska, or have you ever been there for any purpose?

Answer. I have never resided there since leaving Nebraska, and I have never been there, nor has my family.

Question 6th. While you were a resident of Dakota Co., Nebraska, did you own or have the title to certain real estate known as the west ½ of the northeast ¼ of section 33, township 29, in range 9 east, in Dakota Co., Nebraska?

Answer. I owned the land described in the above question subject to a trust mortgage in favor of Isaac Harter.

Question 7. How long did you own this land?

—. I owned it about one year and then conveyed it to James W. Virtue, and that afterwards, in the winter of 1863, at my request, he conveyed the undivided one-half of the land above described to my wife, Mary A. Lockwood.

Question 8. At the time you purchased this property what, if anything, did you know of the incumbrance on the land mentioned in your answer to question No. 6 above?

Answer. I knew of that incumbrance or mortgage to Isaac Harter and took it subject to it and agreed to pay the mortgage.

Question 9. What was the value of the land at the time you owned it?

Answer. Well, I should say about $7.00 an acre, and I consider that a fair estimate.

109 Question 10. Now you may state as to whether you ever took actual possession of the land or paid any taxes on it or exercised any control or care over it.

Answer. I never took any actual possession of it, never paid any taxes on it, as I believe, nor did I ever exercise any control or acts of ownership or care over it at any time.

Question 11. At the time you removed from Nebraska what was your intention concerning this land?

Answer. I had no specific intention in regard to this land, but

abandoned it, along with a large amount of other lands, over none — which I have ever sought to exercise any control.

Question 12. Did you, at the time of leaving Nebraska or subsequently, intend to make any claim to the land or assume any ownership or interest in it?

Answer. I did not intend to do so.

Question 13. Have you since that time ever claimed or exercised any ownership or control over the land described herein or any interest in it, or have you ever intended to do so?

Answer. I never have exercised any control, nor have I intended to, nor any ownership thereto.

Question 14. When did you first learn that the plaintiff, Twohig, or any other person desired to obtain from you a release or quitclaim deed from the land described herein?

Answer. In the late autumn of 1888.

Question 15. Who first conferred or wrote to you in regard to the matter?

Answer. Messrs. Fair and Evans, attorneys, in Dakota Co., Nebraska.

Question 16. Was quitclaim deed made by you and wife for this land obtained by personal communication or by letter?

Answer. It was obtained by letter, through Fair and Evans.

Question 17. What interest or property in this land did you claim to be owner of, if any, during the negotiations for the quitclaim deed?

110 Answer. So far as I can remember, I made no claim of right to property or ownership in the land, but simply accepted a proposition from them to make a quitclaim deed, with my wife, upon the payment to us of fifty dollars.

Question 18. What consideration did you receive for executing that deed and from whom did you receive it?

Answer. I received fifty dollars, as shown by the letter hereto annexed and marked Exhibit A, and from, as I believe, James P. Twohig, the plaintiff in this action, through Fair and Evans.

Question 19. Now you may state what, if anything, you may know about the mortgage or trust deed from Eugene Wilbur to Augustus Kountze on the above-described lands to secure promissory note of $140.00, payable to Isaac Harter 12 months after date, said trust deed and note being executed and delivered on February 27, 1858.

Answer. I knew of such trust mortgage to secure the note described in the above question and delivered as described in the question. I knew of its existence at the time I bought the land, and knew it was a lien on the land at the time I bought.

Question 20. What, if anything, do you know about proceeding being instituted in the district court of Dakota county, Nebraska, in February, 1876, to foreclose said mortgage or trust deed mentioned in the proceeding question and answer?

Answer. I am not certain about the dates, but I knew such proceedings were pending, and, I believe, at that time.

Question 21. You may state what notice, if any, you and your

wife received at or about the time of the pendency of the foreclosure proceedings.

Answer. I cannot state with absolute certainty what was the specific character of the notice, but I believe it was by the legal notice in a newspaper and also by communication by letter from Charles D. Martin, a resident of Dakota City.

111 Question 22. Do you know James W. Virtue referred to above?

Answer. I do.

Question 23. Which of you left Dakota Co., Nebraska, first and where did James W. Virtue go?

Answer. Virtue left about 2 years before I did and went to Oregon to reside.

Question 24. Well, now, then, at the time he left Dakota Co., Nebraska, what, if anything, do you know of his intention of abandoning the lands in which he was interested?

Answer. I cannot answer as to his intention in respect to his abandoning his lands, but he left a large amount of lands there, which, as I believe, have remained there undisposed of by him. As to his intention in respect to the particular land in question, I think his was the same as mine—the land was of so little value that there was nothing in it above the incumbrance. So far as my knowledge goes, Virtue never had any possession of said land or exercised any control over it.

Question 25. You may state whether you ever paid any interest on the note of Isaac Harter mentioned herein or ever paid any taxes on the land described herein or ever paid any interest or principal on the note or mortgage herein mentioned.

Answer. I never paid anything upon the principal or interest on said note or mortgage and I never paid any taxes on the land, as I believe.

Question 26. What reason, if any, can you assign for not doing so?

Answer. Because I didn't believe the land was worth the amount owing to Harter on the note and mortgage.

WM. F. LOCKWOOD.

112 MARY A. LOCKWOOD, being by me first duly sworn, deposes and says as follows:

Question 1. State your name, age, occupation, and place of residence.

Answer. My name is Mary A. Lockwood; my age is 59 years; my occupation is —, and my residence is Put-in-Bay Island, Ottawa Co., Ohio.

Question 2. Have you ever resided in Dakota Co., Nebraska? And, if so, state between what years.

Answer. Yes; from 1859, and left in the autumn of 1864. My husband was there some time before I was and I left before he did.

Question 3. In what year did you leave there?

Answer. I left there in 1864.

Question 4. At the time you left there did you ever intend to return to Dakota Co., Nebraska, to reside?

Answer. No, sir.

Question 5. Did you at one time own the undivided ½ of west ½ of the northeast quarter (¼) of section 33, township 29, in range 9 east, in Dakota Co., Nebraska?

Answer. Yes.

Question 6. At the time you became the owner of this land did you know of and take the land subject to a mortgage executed by Eugene L. Wilbur to Augustus Kountze to secure a promissory note of $140.00, payable to Isaac Harter 12 months after date?

Answer. Yes.

Question 7. Did you ever take possession of, pay any taxes on, or exercise on or care over this land?

Answer. No.

Question 8. What was your intention concerning this land at the time you left Dakota Co., Nebraska?

Answer. I intended to and did abandon the land.

Question 9. Did you at that time or have you since intended to make any claim to the land?

Answer. No.

113 Question 10. Have you since that time exercised any claim or ownership over the land?

Answer. No.

Question 11. When did you first ascertain that the plaintiff, Twohig, or any other person desired to obtain from you a release or quitclaim deed of said land?

Answer. In the autumn of 1888, through a letter from Fair and Evans to my husband, William F. Lockwood.

Question 12. Did you make a quitclaim deed about that time?

Answer. Yes; in December of 1888, I believe.

Question 13. Did you represent yourself as being the owner of or having any interest in the property described herein during the negotiation for that deed?

Answer. I made no representations whatever, but was willing to give a quitclaim on receipt of $50.00.

Question 14. Was $50.00 the only consideration you received?

Answer. Yes.

Question 15. Do you know from whom this consideration came?

Answer. It came from Twohig, the plaintiff, through Fair and Evans, his attorneys.

Question 16. What, if anything, do you know of proceedings being instituted by Isaac Harter in February, 1876, or shortly after that, in the district court of Dakota Co., Nebraska, to foreclose the mortgage and note that was upon this land at the time you became the owner of it?

Answer. I had knowledge of the pendency of such proceedings, but whether it was by notice in newspaper or by letter or both I not now able to say.

Question 17. Did you know James W. Virtue?

Answer. Yes; I did.

Question 18. What is the fact of his leaving Nebraska before you did?

114 Answer. He left before I did.

Question 19. Where did he go to?

Answer. He went to the State of Oregon.

Question 20. Do you know whether or not James W. Virtue had ever possession of either the whole or any portion of the land described herein?

Answer. I don't know, but don't think he had, and don't think he ever exercised any care or control over it.

Question 21. Did you ever pay any taxes upon the land described herein and being the same lands deeded by you and husband to Twohig?

Answer. No; I never did.

Question 22. Did you ever pay any of the principal or interest of the mortgage or note or either?

Answer. No; I never did.

Question 23. What reason can you gove for abandoning the lands described herein and being the same lands deeded by yourself and husband to Twohig?

Answer. I did not think it worth the claim of Harter.

Question 24. What did you regard the land worth at that time?

Answer. I would not have given one dollar per acre for it. I considered it almost worthless at the time I left Nebraska.

MARY A. LOCKWOOD.

EXHIBIT A.

DECEMBER 19TH, 1888.

GENTLEMEN: Herein I send a deed to be delivered to Messrs. *Fair & Evans*, or to such parties as they may designate to you, upon the payment to you for me of the sum of *fifty dollars* and any charges you may name in addition for your trouble.

You must, of course, hold the deed until such payment, giving them an opportunity for inspection only.

You will transmit the $50 to me in New York draft, as per this address.

Yours, &c., WM. F. LOCKWOOD,

Erie Co. *Sandusky, Ohio.*"

115 THE STATE OF OHIO, } ss:
Lucas County, }

I, Arion E. Wilson, a notary public in and for the county and State aforesaid, duly commissioned and qualified, do hereby certify that the above-named William F. Lockwood and Mary A. Lockwood were by me severally sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by them respectively subscribed, as above set forth, were reduced to writing by me and in presence of the witnesses respectively, and were subscribed by said witnesses in my presence, and were taken at the

time and place in the annexed notice specified, and continued from day to day as set forth.

I do further certify that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit.

In witness whereof I have hereunto set my hand and seal of office this 10th day of February, 1891.

[SEAL.] ARION E. WILSON,
Notary Public, Lucas Co., Ohio.

THE STATE OF OHIO, }
Lucas County, } *ss:*

I, J. P. Bronson, clerk of the court of common pleas, the same being a court of record, within and for the county of Lucas and State of Ohio, do hereby certify that Arion E. Wilson, before whom the annexed depositions *was* taken, and to the certificate whereof he has signed his name officially in his own proper handwriting, was at the date thereof and now is a notary public within and for said county of Lucas, duly commissioned and sworn as such, and that by virtue of said office and the laws of the State of Ohio he was fully authorized to administer oaths and affirmations and to take and certify to affidavits and depositions; also, that I am acquainted with the handwriting of the above-named notary public, and verily believe his official signature to the annexed certificate is genuine.

116 In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Toledo, this 10th day of February, A. D. 1891.

[SEAL.] J. P. BRONSON, *Clerk.*
A. HADNETT, *Deputy.*

Upon the back of said depositions appear endorsements in words and figures following, to wit: No. 3, N. Depositions. Received Feb. 13, '91, and opened by order of court Feb. 25, '91. E. D. Frank, clerk.

Thereupon, afterwards, to wit, on the 8th day of June, 1891, stipulation of facts was filed in said case; which said stipulation is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

JAMES P. TWOHIG, Plaintiff, }
vs. } Stipulation of Facts.
ISAAC HARTER *et al.*, Defendants. }

It is hereby stipulated and agreed by and between the parties to this action that a certain quitclaim deed was made on the 19th day of December, 1888, by Mary A. Lockwood and William F. Lockwood, and conveying to James P. Twohig, the complainant herein, all of their right, title, and interest in and to the west half (W. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of section thirty-three (33), township

twenty-nine (29), range nine (9) east of the 6th P. M., to complainant, a true copy of said deed being attached to and made a part of this agreement; and — is hereby agreed that this stipulation shall be introduced in evidence and considered by the court in support of the supplemental bill filed herein, and have the same force and effect as if the original deed had been introduced, and subject only to any objections that might be made to the introduction of said original deed.

J. H. & C. M. SWAN,
Att'ys for Def't-.

117 W. E. GANTT, *Att'y for Pl'ffs.*

Know all men by these presents: That we, Mary A. Lockwood and Wm. F. Lockwood, her husband of —— county, and State of Ohio in consideration of the sum of one hundred dollars in hand paid by James P. Twohig, of Dakota county, and State of Nebraska, do hereby quitclaim unto the said James P. Twohig all our right, title and interest in and to the following-described premises, situated in the county of Dakota and State of Nebraska, to wit: The west half (W. ½) of the northeast quarter (N. E. ¼) of section thirty-three (33) township twenty-nine (29) range nine (9) east of the 6th P. M.

And the said Wm. F. Lockwood hereby relinquishes his right of in and to the above-described premises.

Signed the 19th day of December A. D. 1888.

MARY A. LOCKWOOD.
WILLIAM F. LOCKWOOD.

In presence of—
DAN'L R. TILDEN.
E. J. ESTESS.

STATE OF OHIO, } *ss:*
Cuyahoga County, }

On the 19th day of December, A. D. 1888, before me, Dan'l R. Tilden, a notary public within and for said county, personally came Mary A. Lockwood & Wm. F. Lockwood, personally to me known to be the identical persons whose name- are affixed to the above instrument as grantors, and severally acknowledged the execution of the same to be their voluntary act and deed for the purposes therein expressed.

In testimony whereof I have hereunto subscribed my name and affixed my official seal, at Cleveland, on the date last above written.

[SEAL.] DAN'L R. TILDEN,
Notary Public.

Endorsed: Quitclaim deed. Mary A. Lockwood and Wm. F. Lockwood to James P. Twohig. Entered for taxation the 28th day of January, A. D. 1889. J. P. Twohig, county clerk. Filed for record this 28 day of January, A. D. 1889, at 9 o'clock a. m., and re-

corded in Book S of Deeds, on page 338. J. P. Twohig, register of deeds.

118 Upon the back of said stipulation appear endorsements in words and figures following, to wit: No. 3, N. Circuit court, district of Nebraska. James P. Twohig, plaintiff, *vs.* Isaac Harter *et al.*, defendant-. Stipulation of facts. Filed Jun- 8, 1891. Elmer D. Frank, clerk. Davis, Gantt & Keatley, att'ys for plaintiff.

Thereupon, afterwards, to wit, at the May term of said court, on the 8th day of June, 1891, the following proceedings were had and done in said cause, as appears of record on folio 615, Journal "P" of said court, to wit:

JAMES P. TWOHIG
vs.
GEORGE D. HARTER *et al.* } Submitted on Merits.

This cause, coming on for hearing, was submitted to the court on its merits on briefs of parties on file; whereupon the court takes the same under consideration.

Thereupon, afterwards, to wit, at the said May term of said court, on the 24th day of June, 1891, the following proceedings were had and done in said cause, as appears of record on folio 677, Journal "P" of said court, to wit:

JAMES P. TWOHIG
vs.
GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, Henry W. Harter, Louise Harter, Intermarried with Albert J. Ordean, and Isaac Harter, Administrator of the Estate of Isaac Harter, Deceased. } No. 3, N.

Decree.

This cause came on to be heard upon the amended bill, the answer, reply, and the supplemental bill, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

The court finds that the plaintiff, James P. Twohig, is the owner of the west ½ of northeast ¼ of section (33), township (29), range (9) east, situate in Dakota county, Nebraska, and is entitled
119 to redeem the same from the trust deed given February 27th, 1858, by Eugene L. Wilbur and wife to Augustus Kountze, as trustee for Isaac Harter, by paying the amount secured by said trust deed, with interest thereon, at the rate of 4% per month, from date thereof, and amounting to the sum of 2,313.00, and by paying to the defendants the amount of taxes paid by them upon said lands, with interest on all taxes paid prior to 1879 at the rate of 10% per annum, and with interest on all taxes paid prior to 1879 at the rate of 10% per annum, and with interest on all taxes paid since 1879 at the rate of 7% per annum, and amounting in all to the sum of $1,011.97.

It is therefore ordered, adjudged, and decreed that the plaintiff pay to the defendants, within 90 days from the date of this decree, the sum of 3,323.97, and that upon the payment of said sum to the defendants or to the clerk of this court for the use of the defendants said described land shall stand redeemed from the lien of said trust deed and from the taxes paid as aforesaid, and the title to said lands shall stand quieted and confirmed in the plaintiff, and said defendants shall have no further right in or claim on any of the lands described in said trust deed, and that upon a failure of plaintiff to pay said sums within the time aforesaid that an order of sale shall issue from this court and said lands be sold to satisfy said sums, with interest and costs, and that the defendants pay their own costs of this action, taxed at $—.

That thereupon the defendants pray an appeal to the Supreme Court of the United States, which is allowed and the bond fixed at the sum of fifteen hundred dollars.

And the plaintiff prays an appeal to the Supreme Court of the United States from that portion of the findings and decree which computes interest at the rate of 4% per month, which is allowed and the bond fixed at the sum of $1,500; the plaintiff to pay his own costs or costs made by himself.

(S'g'd) ELMER S. DUNDY, *Judge.*

120 Know all men by these presents that we, George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, and Louise Odean, as principals, and Frederick H. Davis & Freeman L. Loomis, as security, are held and firmly bound unto James P. Twohig in the full and just sum of fifteen hundred ($1,500.00) dollars, to be paid unto the said James P. Twohig and his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

As witness our hand this 8th day of July, A. D. 1891.

Whereas lately, at a term of the circuit court of the United States in and for the district of Nebraska, — division, in a suit depending in said court between said James P. Twohig as plaintiff and said George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, and Louise Odean as defendants, a decree was rendered against the said George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Odean, and they, the said George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, & Louise Odean, having prayed for an appeal, which was duly allowed and entered in open court at the time of rendering and entering said decree, and a citation directed to the said James P. Twohig, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, & Louise Odean shall prosecute their said appeal to effect and answer

all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

GEORGE D. HARTER,
M. D. HARTER,
ISAAC HARTER,
HENRY W. HARTER, &
LOUISE ODEAN, *Def'ts*,

121 By J. H. & C. M. SWAN,
Their Att'ys.

FREDERICK H. DAVIS.
FREEMAN L. LOOMIS.

STATE OF NEBRASKA, } ss:
Douglas County, }

Frederick H. Davis and Freeman L. Loomis, undersigned, being duly sworn, each deposes and says that he is a surety on the foregoing bond, is a resident of the State of Nebraska, is worth the sum of fifteen hundred dollars beyond the amount of his debts, and has property liable to execution in the State of Nebraska equal to the sum of fifteen hundred dollars.

FREDERICK H. DAVIS.
FREEMAN L. LOOMIS.

Subscribed and sworn to before me this 8th day of July, A. D. 1891.

[SEAL.] H. E. GATES,
Notary Public.

Upon the back of said bond appear endorsements in words and figures following, to wit: No. 3, N. James P. Twohig *vs.* George D. Harter *et al.* Supersedeas bond. Approved this 8th day of July, A. D. 1891. Elmer S. Dundy, judge. Filed Jul- 8, 1891. Elmer D. Frank, clerk.

122 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

I, Elmer D. Frank, clerk of the circuit court of the United States for the district of Nebraska, do hereby certify that the foregoing folios from one to 121 contain true and faithful transcripts of the pleadings, process, and proceedings of record and on file in my office as such clerk, and the whole thereof and the endorsements thereon, in the case of James P. Twohig *vs.* George D. Harter *et al.*

Witness my hand and the seal of said court, at Omaha, in said district, this 10th day of July, A. D. 1891.

[Seal United States Circuit Court, District of Nebraska.]

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 14,780. Nebraska C. C. U. S. No. 855. George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, and Louise Odean, appellants, *vs.* James P. Twohig. Filed July 27, 1891.

251
1-18-1918

FILED
SEP 20

RECORD CASE No. 14,780.

IN THE
SUPREME COURT
OF THE UNITED STATES.

Appeal From The Circuit Court of The United States For The District of Nebraska.

GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. HARTER, AND LOUISE ORDEAN, APPELLANTS,

vs.

JAMES P. TWOHIG, APPELLEE.

BRIEF FOR THE APPELLANTS.

J. H. SWAN, AND
HENRY W. HARTER,
Of Counsel for Appellants.

IN THE

Supreme Court of the United States.

GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. HARTER AND LOUISE ORDEAN, *Appellants*, vs. JAMES P. TWOHIG, *Appellee.*	Appeal from the Circuit Court of the United States for the District of Nebraska. BRIEF OF APPELLANTS.

This cause came into this Court on appeal from the decision of the Circuit Court of the District of Nebraska. The case was originally begun in the District Court of Dakota County, in the State of Nebraska, and was removed on petition of the defendants below, to the Circuit Court of the United States for the District of Nebraska, under the statute of the United States providing for the removal of causes.

The case is a proceeding in equity to set aside and declare void, a decree of the District Court of Dakota County, Nebraska, together with the Sheriff's deed based thereon.

The following is a statement of the case:

I.

STATEMENT OF FACTS.

On the 27th day of February, 1858, one Eugene L. Wilbur entered the West Half of the Northeast Quarter of Section 33, Township 29, in Range 9, East of 6 P. M., situate in Dakota County, in the then territory of Nebraska, paying therefor the sum of One Dollar and Twenty-five Cents ($1.25) per acre. Upon the same day Eugene L. Wilbur executed and delivered a trust deed to Augustus Koontz as trustee, upon the said West Half of the Northeast Quarter of Section 33, Township 29, in Range 9, East of 6 P. M., situate in Dakota County, in the then territory of Nebraska, to secure to one Isaac Harter, the father of the appellants, the payment of One Hundred and Forty Dollars ($140.00) upon a promissory note due one year thereafter, which said promissory note was to bear interest at the rate of 4 per cent. per month after maturity. The amount loaned by said Isaac Harter at the time stated to Eugene L. Wilbur upon the eighty acres above described, was more than the value of the land at the time when the trust deed was executed and delivered to secure the same, and no part of the principal or interest due upon the promissory note secured by the said trust deed, has ever been paid to Isaac Harter in his life time, or to the appellants, and the principal and the interest of the same now remain wholly unpaid. The record further shows that on the

2nd day of March, 1860, Eugene L. Wilbur and wife, by a quit claim deed, conveyed the above described eighty acres of land in Dakota County, in the then territory of Nebraska, to one William F. Lockwood; that on February 6th, 1861, said William F. Lockwood and wife, by warranty deed, conveyed said premises to one James W. Virtue; that afterwards, on the 3rd day of February, 1863, the said Virtue, by warranty deed, conveyed an undivided one-half interest in the above described property, to Mary A. Lockwood; that Isaac Harter, now deceased, the father of the appellants, paid the taxes on the property in controversy from 1861 down to the time of his death, which occurred upon the 27th day of February, 1876; that before said Isaac Harter died he placed the trust deed and notes secured thereby, in the hands of his attorney, Isaac Powers, to foreclose the same; that on the 21st day of February, 1876, one Herman Koontz, the agent of said Isaac Harter, duly verified the petition to foreclose such trust deed; that thereafter, on February 28th, 1876, the same was duly filed in the District Court of Dakota County, Nebraska; that the defendants in said suit were William F. Lockwood, Mary A. Lockwood, his wife, and Augustus Koontz, the trustee; at this time Mary A. Lockwood owned an undivided one-half interest in the West Half of the Northeast Quarter of Section 33, Township 29, Range 9, East, 6th P. M., in Dakota County, Nebraska, being one-half of the property in controversy; that thereafter such proceedings were had by

publication as to bring the said William F. Lockwood, Mary A. Lockwood, his wife, and Augustus Koontz, into Court as parties defendant by constructive service. Constructive service on said parties having been duly obtained at the June term, 1876, a decree of foreclosure was entered upon the trust deed herein before described, in favor of said Isaac Harter, plaintiff in said suit and against William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Koontz. And thereafter such proceedings were had that the property in controversy was sold at Sheriff's sale to Isaac Harter on the 12th day of August, 1876. The amount due under the trust deed upon the promissory note secured thereby, amounted on the 5th day of June, A. D. 1876, to Twelve Hundred and Forty-eight Dollars ($1248.00). The property was appraised at Eight Hundred and Eighty Dollars ($880.00) before the same was sold at Sheriff's sale as aforesaid.

Isaac Harter being dead and the property having been offered for sale and having not sold for enough to pay the amount of the decree obtained upon the foreclosure of the trust deed given by Eugene L. Wilbur to Isaac Harter, the heirs of Isaac Harter were compelled to pay the costs of the proceeding, to foreclose said trust deed amounting to Sixty-nine Dollars and Forty-two Cents ($69.42). Thereafter, upon the 10th day of May, 1877, said sale having theretofore been approved and confirmed by the Court, a Sheriff's deed to Isaac Harter was duly executed by Nicholas Maher, Sheriff of Dakota County, Nebraska, for the

West Half of the Northeast Quarter of Section 33, Township 29, Range 9, East, 6 P. M., in Dakota County, Nebraska, and by him delivered to Isaac Powers, Jr., attorney of Isaac Harter, who delivered the same to these appellants, who at the time of receiving the same did not know that there was any irregularity connected with the foreclosure proceedings herein before referred to. These appellants believing that they had a good and sufficient deed for the property in question, on the 10th day of June, 1877, filed the same for record with the County Clerk of Dakota County, and ever thereafter, until the commencement of this cause in the District Court of Dakota County, Nebraska, held themselves to be the owners thereof, paid the taxes thereon, offered the same for sale, had correspondence with divers parties concerning the said land, and exercised all the rights of property and dominion over the real estate in controversy, which was exercised by any person from the 1st day of June, 1877, up to the 21st day of December, A. D. 1888, when this action was begun by the appellee, James P. Twohig.

The land in controversy, which was of very little value in 1858, remained of comparatively little value, at no time indeed being worth over $20.00 an acre, up to the Spring of 1887, when a railroad bridge was built across the Missouri River from Sioux City to South Sioux City, where a town was laid out and this land arose rapidly in value, until, at the time of the commencement of this action, it was worth $200.00 an

acre. From the first of June, 1877, when the deed was filed for record, until December, 1888, no claim was made by the appellee, James P. Twohig, or any of his predecessors in his alleged title, to the land in controversy. These appellants paid the taxes, claimed the land as their own under the Sheriff's deed, endeavored to sell the same, and did such other acts connected with the land that the same became generally known in the community in which it was located, as the "Harter land." The plaintiff below, James P. Twohig, was, in the summer of 1888, the Clerk of the District Court of Dakota County, Nebraska, when an affidavit was filed in his Court by Isaac Harter, one of the appellants, for the purpose of perfecting the title to another piece of real estate in Dakota County, Nebraska, belonging to the appellants and which they were about to sell. This affidavit showed that Isaac Harter, the father of the affiant, died in February, 1876. As soon as the said James P. Twohig, the appellee, discovered this, he went to looking for a flaw in the title of the land in controversy, making use of his official position so to do, and after discovering what he considered a flaw, obtained a quit claim deed from James W. Virtue for the West Half of the Northeast Quarter of Section 33, Township 29, Range 9, East, 6 P. M., for the nominal sum of $350.00. This deed bears date, September 3rd, 1888.

The first intimation which the appellants ever had of any alleged defect in their title to the land in controversy was, when James P. Twohig after ob-

taining the Virtue deed in 1888, wrote to the appellant, Isaac Harter, a letter stating that he had the title to the land and demanding a settlement.

The said Twohig shortly after commencing said correspondence, began this action for the recovery of an undivided half of the land now in controversy in this suit. During the pendency of the suit for the recovery of the undivided half of the land in controversy, the said James P. Twohig, the appellee, on or about the 28th day of January, 1889, obtained a quit claim deed from Mary A. Lockwood and William F. Lockwood, for an undivided half of the land in controversy for the consideration of Fifty Dollars ($50) and filed the same for record in the Register of Deeds office in Dakota County, Nebraska. On the 20th day of November, 1890, the said James P. Twohig filed his supplemental petition in the Circuit Court of the United States of the District of Nebraska, to set aside the decree of the District Court of Dakota County, Nebraska, and the Sheriff's deed based thereon, and thus brought into controversy the entire West Half of Northeast Quarter of Section 33, Township 29, Range 9, East, 6 P. M., situate in Dakota County, Nebraska.

In the year 1886, William F. Lockwood and his wife, Mary A. Lockwood, left Dakota County, Nebraska, abandoning their interest in the undivided half of the land in controversy, for the reason that it was not worth the amount of the claim secured by the trust deed upon the same. Two years before this,

James W. Virtue left Dakota County, Nebraska, going to the State of Oregon, where he has since resided. When he left he abandoned his undivided half of land in controversy. Neither James W. Virtue, nor William F. Lockwood, nor Mary A. Lockwood, from 1864, ever exercised any rights of ownership whatever over the land in controversy, or had any agent do so for them, but wholly abandoned and renounced their interest in the land; never returned to look after the same, or had any concern whatever in regard thereto, until the fall of 1888, when Virtue having returned to Dakota County on a visit, Twohig obtained a quit claim deed from him for an undivided one-half interest in the land in controversy. The lands in controversy have never been cultivated or fenced, and up to the year 1887, were wild lands and of little or no value.

The question involved in the case is, as to whether or not the appellee, under all the circumstances of the case, is entitled to have the decree of the District Court of Dakota County, Nebraska, entered in the case of Isaac Harter against William F. Lockwood, Mary A. Lockwood, his wife, and Augustus Koontz, trustee, on the 5th day of June, 1876, vacated and held for naught, and the Sheriff's deed for the land in controversy, executed and delivered on the 10th day of May, 1877, declared void.

This is the question which arises upon the pleadings and the evidence which are all set out in the record.

II.

SPECIFICATIONS

Of the Particulars in which the decree of the Circuit Court of the United States for the District of Nebraska, is claimed by the appellants, to be erroneous.

1. The answer of the appellants set up the plea of the statute of limitations. This plea was sustained by the evidence and the Court below erred in not so holding and entering a decree in accordance with such holding.

2. The answer of the appellants set up the plea of abandonment of the real estate in controversy. This plea was sustained by the evidence and the Court below erred in not so holding and entering a decree in accordance with such holding.

3. The answer of the appellants set up the plea of a title to the premises in controversy by adverse possession. This plea was sustained by the evidence and the Court below erred in not so holding and entering a decree in accordance with such holding.

4. The answer of the appellants set up the plea of gross laches upon the part of the grantors of the plaintiff below. This plea was sustained by the evidence and the Court below erred in not so holding and entering a decree in accordance with such holding.

III.

ARGUMENT.

In discussing the questions of law arising in this case, we shall pursue the plan of presenting in their order, the foregoing several specifications of error in the decree of the United States Circuit Court for the District of Nebraska.

The decree of the District Court of Dakota County, Nebraska, and the deed based thereon, are regular upon their face and the question presented here is whether a Court of Equity should allow the introduction of testimony to show that the decree and the deed are otherwise than regular and valid after the lapse of so many years. This brings us to the question of the consideration of the effect of the statute of limitations upon this action in equity.

1. The Statute of Limitations.

The plaintiff below claimed the right to have the decree and Sheriff's deed aforesaid, set aside, and the further right to redeem the land in controversy.

The statute of Nebraska provides, "An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued." This section can be construed to apply also to mortgages.

The Nebraska statute further provides in substance, that, "A person served by publication in a

newspaper only, can have judgment set aside within five years after date of judgment by filing an answer and making it appear that he had no knowledge of the pendency of the action."

An important question to determine is this:—When did Twohig and Lockwood, the appellee's grantors, have the right of action to set aside the decree of the District Court of Nebraska and the Sheriff's deed based thereon?

We think the right of action to vacate the decree and redeem the land, accrued upon the 5th day of June, 1876, (see Record, p. 45) and that the right of action to set aside the Sheriff's deed based upon it, accrued upon the date of said deed, to-wit, the 10th day of May, 1877, (see Record, p. 47). This deed was filed for record June 1st, 1877, (see Record, p. 48).

There is no claim that any of the parties during the entire period of ten or more years, were under any disabilities which would prevent the statute from running. This action was not commenced until the 20th day of December, 1888, (see Record, p. 4) and until more than ten years had elapsed since the right of action accrued. It hasbeen well said that, "In general it is a rule in equity as well as in law that the cause of action arises when and as soon as the party has the right to apply to the proper tribunal for relief."

See Buzwell on Limitations and Adverse Possessions, Sec. 27.

When was that in the case at bar? Clearly, when the rights of the appellee's grantors were in-

vaded by the entry of the decree and the execution, delivery and filing for record of the Sheriff's deed. More than the statutory period has elapsed since those events and before the bringing of this action, and the plaintiff's right of action is therefore barred by the statute of limitations.

2. Abandonment.

The appellants claim that the plaintiff below, the appellee, James P. Twohig, is not entitled to the relief demanded because his grantors, James W. Virtue, William F. Lockwood and Mary A. Lockwood, having abandoned the land in controversy in 1864 and 1866, respectively, had no interest therein upon which a deed could operate or which they could convey.

The doctrine of abandonment is not a novel one in the law of real estate. Mere absence from real estate does not constitute an abandonment. In order to constitute an abandonment the absence from the real estate of the owner or late owner, must be accompanied by an intention to renounce and abandon his ownership in the land. This idea has been well expressed by another in the following language: "Abandonment includes both the intention to abandon and the external act by which the intention is carried into effect." See

The American and English Encyclopedia of Law, Vol. I, p. 1.

Judson vs. Morrow, 40th Cal., p. 300.

Waring vs. Crow, 11th Cal., p. 367.

Keane vs. Cannovan, 21st Cal., p. 292.

Dyer vs. Sanford, 9 Metc. (50 Mass.) p. 395.

Wiggins vs. McCleary, 49 N. Y., p. 347.

Heath vs. Biddle, 9 Pa. St., p. 273.

The questions which the Court must consider when abandonment is set up, are more frequently questions of fact than questions of law. The law governing the subject is plain and easily ascertained, and the only question with which a Court can have any difficulty in regard to abandonment, is the question of fact. The difficult thing in every case to ascertain is, Have the act and the intention of a party combined so as to amount to an abandonment? The question of abandonment is one which may be proved by circumstantial evidence. "Abandonment of land is necessarily a question of intention, but that intention may be gathered from all the acts of a party alleged to have abandoned." See

Davis vs. Perley, 30 Cal., p. 631.

Roberts vs. Unger, 30 Cal., p. 676.

Burke vs. Hammon, 76 Pa. St., p. 172.

What do the facts in this record show as to the abandonment of the land in controversy by the grantors of the plaintiff, the appellee, James P. Twohig?

One of these grantors was James W. Virtue, who, on or about the 3rd day of September, A. D. 1888, for the consideration of Three Hundred and Fifty Dollars ($350) conveyed to James P. Twohig, the plaintiff below, by a quit claim deed, the West Half of the Northeast Quarter of Section 33, Township 29, Range 9, East, 6th P. M., in Dakota County, Nebraska, one-

half of which real estate he had many years theretofore transferred to Mary A. Lockwood. (See Record, pages 55-33-34.)

The other of said grantors was Mary A. Lockwood, (with whom her husband, William F. Lockwood, joined,) who on the 19th day of December, A. D. 1888, for a consideration of Fifty Dollars ($50.00), conveyed the West Half of the Northeast Quarter of Section 33, Township 29, Range 9, East, 6th P. M., to James P. Twohig, although she only owned an undivived half of the real estate conveyed. (See Record, pages 33-76-77-78-79-81.)

The plaintiff below, James P. Twohig, claims to have derived a title to an undivided one-half of the real estate in controversy from said James W. Virtue, and the other undivided half thereof from Mary A. Lockwood and her husband, William F. Lockwood.

The facts surrounding the conduct of the Lockwoods and James W. Virtue are somewhat different and we will therefore consider the facts tending to prove the abandonment of the land in controversy by the Lockwoods, separately from those tending to prove the abandonment of said land by said James W. Virtue.

The deposition of William F. Lockwood and the deposition of his wife, Mary A. Lockwood, found on pages 74-75-76-77-78-79 of the Record, are very convincing on the question of abandonment.

William F. Lockwood testifies in substance, that he was Territorial Judge of Nebraska from the year

1856 to 1866; that he ceased to reside in Nebraska in 1866; that when he left there it was not his intention to again return to Nebraska as a residence; that after leaving Dakota County, Nebraska, in 1866, he had never been there for any purpose; that while a resident of Dakota County, Nebraska, he owned the following real estate situate therein, viz: The West Half of the Northeast Quarter of Sec. 33, Township 29, Range 9, East, 6th P. M., subject to a trust deed in favor of Isaac Harter; that he conveyed the same to James W. Virtue in the winter of '63; that thereafter said James W. Virtue conveyed an undivided one-half of the above described real estate to his wife, Mary A. Lockwood; that he knew of the encumbrance or mortgage to Isaac Harter and took the land subject to it and agreed to pay the mortgage; that in 1866 he regarded the land as worth Seven Dollars ($7) an acre; that he never had any actual possession of the land and never paid any taxes thereon, and never exercised any control or acts of ownership over the land whatever; that at the time he removed from Nebraska he abandoned the land in controversy along with a large amount of other lands, with the intention of never exercising any control or ownership, or claiming any interest whatever in it thereafter; that since said time he had never claimed or exercised any ownership or control over the land whatever, and never intended so to do; that Twohig, the plaintiff below, the appellee in this Court, in the autumn of 1888, through his attorneys, opened negotiations for a quit claim deed for the premises in contro-

versy, for which they received the sum of Fifty Dollars ($50.00); that they knew of the pendency of the proceedings in the District Court of Dakota County, Nebraska, in which the decree was entered which it is proposed to set aside in this action; that he knew of the pendency of the action at the time of the foreclosure proceedings; that he never paid either the principal or the interest of the notes secured to Isaac Harter by the trust deed, and never paid any taxes thereon, and that the reason why he did not was that the land was not worth the amount owing to Harter on the note and mortgage.

Mrs. Lockwood's testimony is much to the same effect. The points however, in her testimony which we wish to emphasize are, that she abandoned the land in 1864, having left Nebraska before her husband; that she received but $50.00 for the quit claim deed which she executed and delivered to Twohig; that when she abandoned the land she did it because the land was not in her judgment, worth at the time, as much as the Harter claim, and because she considered it almost worthless at the time she left Nebraska.

She further says that she intended to abandon the land and did abandon it.

The testimony of Thomas L. Griffey, (see the Record, p. 35), the testimony of Kelly W. Frazer, (see the Record, p. 53), and the testimony of E. L. Wilbur, (see the Record, p. 59), corroborate the testimony of Mr. and Mrs. Lockwood.

In regard to the abandonment of the land in con-

troversy by the Lockwoods, the proof is simply overwhelming.

We have in their case, the actual abandonment of the land, their absence from it and entire neglect of it for twice the statutory period, coupled with an intent to abandon the land at the time they left Nebraska, and a motive for its abandonment.

The land at that time was not worth the amount of the claims against it and hence they abandoned it. It seems to us that nothing can be clearer under the law and the evidence, than the fact that as to the undivided half of the West Half of the North-East Quarter of Section 33, Township 29, Range 9 East, 6th P. M., in Dakota County, for which James P. Twohig, the plaintiff below, obtained a quit claim deed from the Lockwoods for $50.00, that the plaintiff below, James P. Twohig, the appellee in this Court, is not only not entitled to the relief which he demands, but that he has absolutely no title whatever, for the reason that the Lockwoods who made a quit claim deed to him, had, more than twenty years before, abandoned the land and all right, title and interest to it.

Let us now, as briefly as possible, consider the testimony bearing upon the abandonment of the undivided half of land in controversy by James W. Virtue in 1864.

It is true that there are no declarations of James W. Virtue in regard to his intention about the land in controversy, when he left Dakota County, Nebraska, in 1864, but the circumstances showing the abandon-

ment of the land by Virtue are so cogent as to be irresistible. The fact that his deposition was not taken by Twohig in this case, is a powerful circumstance tending to show that had he been put upon oath he would have been constrained to admit that he abandoned the land in 1864 with the intention of renouncing the title thereto, for the reason that the mortgage and claim thereon amounted to more than the value of the land at that time. The facts and circumstances in the case however, show to a moral certainty that he abandoned the land in 1864 intending so to do. We think the Court should consider the testimony of William F. Lockwood and Mary A. Lockwood and the motives which actuated them in abandoning their land in Dakota County, Nebraska, in considering the other evidence bearing upon the conduct of James W. Virtue.

The value of this land when it was conveyed by William F. Lockwood and wife to James W. Virtue, on the 6th of February, 1861, was little if any, in excess of the claim against it, as Virtue paid a consideration of Forty Dollars ($40) in cash, and property taken at the value of Twenty-Five Dollars ($25). (See pages 34 and 62 of the Record.)

Virtue had very little invested in this property and on the 3rd of February, 1863, he conveyed one-half of the same to Mary A. Lockwood. In 1864 when Virtue left Nebraska, (see pages 53 and 59, 75 and 77 of the Record) the amount of the claim against his undivided half of the North-East Quarter of Section 33,

Township 29, Range 9, 6th P. M., was more than the value of the land, and he therefore had a motive for abandoning it. When he left Nebraska and abandoned this land, he knew that the claim against it amounted to more than the value of the land at the time. He knew that there were claims for taxes against it which he never paid. He knew that the same was liable to be sold for taxes and that the trust deed thereon was liable to foreclosure. The Record discloses that from 1864 when he left Dakota County, Nebraska, until 1888, when he returned on a visit, he never claimed right, title or interest in the land in controversy; and that he never looked after the same, paid the taxes thereon, or exercised any other right over the same, but wholly abandoned it and neglected to discharge the mortgage thereon, and his duty as a citizen in paying the taxes to the state. These are all powerful circumstances tending to show that the act of leaving Dakota County and the intent to abandon his interest in the land in controversy, combined at the time that James W. Virtue went to Oregon. There is however, another circumstance which emphasizes the intention of Virtue to abandon the land. This is found in the testimony of Thomas L. Griffey, (pages 35-36 of the Record.) Thomas L. Griffey therein states that, "when James W. Virtue left he left his business matters with Koontz Brothers, at Omaha, and I attended to his matters under their directions. Whenever Virtue required anything done, it was done by me through Koontz Brothers' directions. The only property that I had any in-

structions about, were some lots in Dakota City, (here follows a description of the property.) These lots stood in the name of Augustus Koontz until June 20th, 1877. I knew that they were Virtue's lots, and by Koontz's direction I paid the taxes upon them until they were transfered. I do not think that either Lockwood or Virtue, other than as above, left their business with any one or left any directions with any one to look after their property or interests here, if they claimed any."

During all these years Isaac Harter, the father of these appellants, up to his death, paid and since that time these appellants have paid, the taxes upon the land in controversy, (see p. 31 of the Record) claiming the same as their property under the Sheriff's deed, which, as heretofore stated, was placed upon Record on the 1st day of June, 1877. For more than twice the statutory period of limitation, Virtue who had abandoned this land, never returned to look after it, to see whether it had been sold for taxes or under the mortgage, or to inquire in any manner about it; paid no taxes thereon and exercised no ownership thereof. (See pages 53-54-59 of the Record.

There could be no stronger case of abandonment of title than this made out by the facts in this case and the conduct of James W. Virtue.

Briefly summarized, we have the motive to abandon the property; the abandonment of it in fact; the intention of abandonment shown by the fact that after Virtue had abandoned this land he still took care of

other property in Dakota County which was valuable and failed to take care of this which had no value beyond the claim or debt against it; the non-payment of taxes for twenty odd years, although he knew the land would be sold for the non-payment of the same, and the failure to pay the amount secured by the trust deed, either principal or interest thereof, although he knew that the land was subject to sale and foreclosure under said trust deed. The chain of circumstances showing abandonment is perfect. There is not a single link missing, and if such a chain of circumstances were proved against a defendant in a criminal case, he could not escape conviction.

We therefore submit to the Court that long before September 3rd, 1888, the date of Virtue's quit claim deed to James P. Twohig, the said Virtue had abandoned all right, title and interest to the land in controversy and had nothing whatever which he could convey to the said James P. Twohig.

3. Adverse Possession.

In considering the question of the adverse possession of these appellants of the land in controversy, we desire the Court to keep in mind the fact that said lands were wild, uncultivated, unfenced, and that no person claiming a title thereto had ever had such possession of the land as is technically known as *possessio pedis*. See the testimony of Thomas L. Griffey, (page 33 of the Record), the testimony of Kelly W. Frazer, (see pages 53-55 of the Record), and the testimony of E. L. Wilbur, who entered the land, (pages 58-59-60 of

the Record.)

"The rule which requires actual corporeal possession, or the exercise of acts of ownership in order to constitue an adverse possession, is of necessity relaxed in the case of wild or uncultivated lands and lands remote from settlements."

Buzwell on Limitations and Adverse Possession, Sec. 252.

Angell on Limitations, Sec. 394.

This statement in the text is based upon the leading case of Greene vs. Leiter, 8th Cranch, p. 229, decided by Mr. Justice Story.

The lands in controversy were wild lands which were uncultivated and unfenced and in a new country. Now, what acts of possession did the appellants exercise over this property? Let us see. The very foundation of the principles controlling title by adverse possession is notoriety, so as to prevent frauds upon the land and upon tenants. It has been held in Nebraska that an action to foreclose a mortgage is a proceeding in rem so far as it is sought to subject the mortgaged property to the payment of the mortgage debt. See,

Peters vs. Dunnells, 5th Neb., p. 464.

Hurley vs. Esteys, 6th Neb., p. 386.

Jones vs. Null, 8th Neb., p. 60.

We have then in this case, the following circumstances tending to show the title of these appellants to the lands in controversy by adverse possession. A sheriff's deed obtained in a Court of Record, having

jurisdiction to foreclose a mortgage or trust deed, the decree of which Court and which sheriff's deed are regular and valid upon their face and are good unless set aside in equity. See the decree of the District Court of Dakota County, Nebraska, pages 45 and 47 of the Record. This decree was entered more than ten years before the bringing of this suit, and the deed based upon the same was also placed on record more than ten years before the bringing of this suit.

These appellants have paid the taxes upon the real estate in controversy, before and ever since the entry of the decree and the placing of the deed upon record. (See the Record, p. 31.)

In Horback vs. Miller, 4th Nebraska, p. 47, the Supreme Court of Nebraska has held that taxation of land for a series of years to the person claiming it, and the payment of taxes by him, are competent evidence tending to show ownership. See also,

Ellicott vs. Pearl, 10th Peters, p. 412.

Allan vs. Gilmore, 13th Me., p. 178.

Little vs. Libey, 2 Greenleaf, p. 242.

Tourtulott vs. Pearce, 27th Neb., p. 63.

In McKesson vs. Hartley, 22nd Neb., p. 697, it is held, "But it is contended by the plaintiff that the possession of the defendant and her grantors was not adverse; that the title of trustee is a recognition of the plaintiff's title and that as the foreclosure proceedings were void, defendants could hold only as assignee of the rights of the trustee and therefore not adversely. Such to our mind, is not the law. Notwithstand-

ing the fact that the foreclosure proceedings have been void, it is clear that the purpose of such proceedings are to cut off and destroy the title of the plaintiff, and therefore, the conveyance by the trustee to Hartley, had it been legal, would have terminated the plaintiff's title. The grantees of Hartley taking and holding the property or asserting their right to hold it under warranty deeds from him, are clearly adverse to the plaintiff. They hold as owners and the statute would run in their favor."

In addition to paying the taxes for more than the period of ten years after the entry of said decree and the record of the sheriff's deed, the appellants exercised the only dominion which was exercised by anybody over the land. It is true it was not fenced or cultivated by them or any other person, but their deed was upon record, they paid the taxes, they corresponded with various parties, endeavoring to sell the land, received communications from divers parties in regard thereto, and did such other acts and things connected with the property that the same became generally known as the "Harter land." See the testimony of Isaac Harter, (pages 23-24-25-26-27-28-29-30-31-32 of the Record,) and also the last paragraph in the testimony of Thomas L. Griffey, page 36 of the Record).

These appellants for more than the period of ten years exercised every right of ownership over the land, except perhaps the surrounding of the same with a fence. This is not an indispensable element in adverse possession. See Ellicott vs. Pearl, 10th Peters, p.

413, where it is said, "The assumption that there can be no possession to defeat an adverse title except in one or other of these ways, that is by actual residence or actual enclosure, is a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land.

The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over the property, but there are many other acts which are equally evincive of such an intention of asserting such ownership and possession. Such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling the trees thereon under color of title." See also,

Booth et al., vs. Small et al., 25th Ia., p. 178, Second Section of Syllabus. Also,

Ewing vs. Burnett, 11th Peters, p. 41

where it is said, "It is well settled that to constitute an adverse possession, there need not be a fence or building or other improvements made."

Brooks vs. Warren, 24th Ill., p. 373.

Farrer vs. Tessenden, 39th N. H., p. 277.

In the case at bar the appellants exercised every right of ownership which could have been exercised over the land necessary to constitute adverse possession except the mere building of a fence around the land. What they did do by placing their deed upon record, paying the taxes, endeavoring to sell the land and the exercise of other rights of ownership over the

same, was better notice to the public that they claimed the land than the mere erection of a fence. This is shown by the fact that the land was known generally in the community where it was located, as the "Harter land."

Notoriety or notice to the world of the claim of title is the very gist of adverse possession. For these reasons we think that under all the circumstances of this case that the appellants have a title to the land in controversy, by adverse possession.

There is another matter to which we desire to call the attention of the Court, which, while it may not be strictly germane to the question of adverse possession, may, with as much propriety be discussed in this connection as in any other in this brief. We refer to the question of constructive possession of these appellants following the placing of the deed for the land by them upon record on the 1st day of June, 1876.

If the land in controversy was abandoned, as we have heretofore argued, by James W. Virtue and the Lockwoods, then they had no right, title or interest in the land whatever, and the deed which was placed on record as aforesaid, even although it might be invalid under ordinary circumstances as against Virtue, who was not a party to the foreclosure proceedings, would be valid enough in this case to carry with it the constructive possession of property. Virtue and the Lockwoods had no possession of the property for the reason that they had abandoned it.

The state had no interest in it and no title to it,

because the taxes were paid by these appellants. The deed was granted in a proceeding in rem, is good upon its face and would carry with it as we claim, the constructive possession of property.

Moreover, it has been held that a judgment for or against a dead man is not a nullity. See.

Carr vs. Townsend, 63 Pa. St., p. 202.

4. Laches.

An important question on this branch of the case, and one which ought to be determined by the Court, is, whether the attack made upon the decree or judgment of the District Court of Dakota County, Nebraska, entered of the 5th day of June, 1876, in this action is a direct or a collateral attack upon the record of that Court. If it is a collateral attack then clearly the plaintiff below was not entitled to any relief whatever as the record would be conclusive against him.

This however, is so elementary that we need not bother the Court with any citations. The reports of the United States Supreme Court and of almost every state in the Union, teem with authorities upon this subject and the text books are unanimous in laying down the rule that the record in such a case would be conclusive in a collateral action and only subject, in a proper case, to direct attack. We are inclined to think however, that the attack made in this case upon the record and decree of the District Court of Dakota County, Nebraska, is not a collateral, but a direct attack because it is a proceeding in equity commenced for the express purpose of impeaching the record of

that Court and of setting aside its judgment. This being a suit in equity to set aside a decree and a conveyance which are upon their face regular and valid, the question of laches becomes a very important one in the determination of the issues involved. We believe that upon the facts in this case under the authorities, that the plaintiff below, the appellee, is excluded by his own laches and those of his grantors and predecessors in the title, from securing the relief prayed for in his petition. We think that this rule applies to the entire West Half of the Northeast Quarter of Section 33, Township 29, Range 9, East of the 6th P. M., although it is quite apparent that the facts surrounding the foreclosure proceeding commenced on the 28th of February, 1876, in the District Court of Dakota County, Nebraska, are somewhat different in regard to the undivided half of the above described real estate which the plaintiff below obtained from James W. Virtue, from those relating to the undivided half of the above described real estate which he obtained from William F. Lockwood, and his wife Mary A. Lockwood. The facts in this case as disclosed in the record, have been so fully stated in the "Statement of Facts" and so fully discussed in this brief under the head of "Abandonment" and "Adverse Possession" that we will not weary the Court with as complete a recital of the facts in the case in the discussion of the subject of laches, as it would otherwise be necessary to make.

The doctrine of laches is peculiarly the child of equity, and has taken definite form in the maxim,

"*Vigilantibus non dormientibus aequitas subvenit.*" The rule is well expressed by Lord Camden in Smith vs. Clay, 3rd Brown, Ch. p. 638, as follows:

"A Court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands where the party slept upon his rights and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence." This is also the rule of the Supreme Court of the United States. In Brown vs. Buena Vista County, 95 U. S., p. 160, Mr. Justice Swayne in defining the rule uses almost identical language when he says, "Nothing can call forth a Court of Equity into activity but conscience, good faith and reasonable diligence." He further says, "Where these are wanting the Court is passive and does nothing. Laches and neglect are always discountenanced and therefore from the beginning of this transaction there was always a limitation to suits in this Court."

The United States Supreme Court in the case of McKnight vs. Taylor, 1st Howard, p. 161, says, "There must be conscience, good faith and reasonable diligence to call into action the powers of a Court of Equity." We find where a claim is not barred by the act of limitations, Courts of Equity will refuse to interfere after a considerable lapse of time from considerations of public policy and from the difficulty of doing entire justice when the original transactions

have been obscured by time. See also,

Godden vs. Kimmel, 99 U. S., p. 201.

Birdsall vs. Johnson, 44 Mich., p. 134.

Carpenter vs. Carpenter, 70 Ill., p. 463.

The Court in this last case says, "The complainant during the period of eighteen years paid no attention to his land; made no arrangement with any one to pay taxes for him. Under the laws of the state it could have been sold for taxes, deed obtained, taxes paid under the deed, which, with possession at the expiration of nine years after his departure would have ripened into an absolute bar to a recovery against him." In the same case the Court quotes with approbation from Perry on Trusts, Sec. 870, as follows: "Acquiesence in a transaction may bar a party of his relief in a very short period. Thus, if one has knowledge of an act, or if it was done with his full approbation, he cannot afterwards have relief, is estopped by his acquiesence," etc.

Mr. Justice Gray in delivering the opinion of the Court in Speidel vs. Henrici, 120 U. S., p. 377, in which he approves and quotes the rule laid down by Lord Camden, says, "This doctrine has been repeatedly recognized and acted upon here." See also,

Parker vs. Dacres, 130 U. S., p. 43.

The cases are so numerous that we can only cite a few of them, but they are all to the same effect. On account of its similarity to the case at bar, we desire to call the Court's attention at some length to the case of Felix vs. Patrick, 36 Fed. Rep., p. 457. The land

in this case was alienated while the town was new and the property of small value. It afterwards became very valuable by reason of the surrounding improvements. It had been laid out and became a part of the improved city of Omaha. The plaintiffs are the original scrip owners. The entry was made in 1861 and conveyed to Patrick, one of the defendants. in 1863, and the bill was filed in 1888. So far the case at bar and Felix vs. Patrick are very similar.

Unlike the case at bar, the plaintiffs, Felix et al., had absolutely no knowledge of the existence of their claims until 1887. They were Indians living in Minnesota and first became citizens August 29th, 1887. They had and could have no way of determining where this scrip had been located, except by an examination of the records at Washington. These cases when compared, present two extremes. In the case cited the excuse for the laches is that the plaintiffs were poor, ignorant Indians with positively no knowledge of their claims and no way to ascertain them except by an examination of the records at Washington. In the case at bar the plaintiff below and his grantors were men of intelligence, the said plaintiff being at the time of the bringing of this suit the Clerk of the Court in which it was brought; one of his grantors having been a Territorial Judge and the other a real estate man. Mr. Justice Brewer in deciding this case, among other things said, "But I do not care to discuss this question for to my mind the other defense is satisfactory and clear. Prior to 1861,

Patrick had been in possession of these lands seeking to acquire the title from the Government. In that year he obtained possession of this scrip and in 1863 acquired the patent. Twenty-eight years after Sofia Felix had parted with her scrip, 27 years after the defendant had obtained and used the scrip, 25 years after the patent had been issued, and when the lands with the growth of the city of Omaha had risen in value from a mere nominal sum to over a million dollars, these plaintiffs who had done nothing to assist in the development and growth of the city, done nothing towards bringing about the increased value of the land, ask that this enormous property be given to them on the grounds that their ancestor was defrauded of the scrip which originally paid for it."

The doctrine of laches is the more willingly resorted to by Courts of Equity where the party invoking the aid of the Court had the means of knowing that his rights were invaded.

Felix vs. Patrick, 36 Fed. Rep., p. 462.

"If a party coming to equity after a long lapse of time since his right to demand relief accrued, desires to escape the consequences of his own laches or those of his privies, those laches must be explained." See

Richards vs. Mackall, 124 U. S., p. 183.

Mr. Justice Harlan in delivering the opinion of the Court said, "We find nothing whatever in the record to excuse the failure of the appellee to institute legal proceedings in due time to have set the sale aside. He knew that the appellant relied upon the

sale and upon the faith of it expended large sums. He knew that the premises here in dispute were in fact levied on for his debts and were intended to be sold in satisfaction of those debts. But after the property has largely increased in value, and after sleeping upon his rights for nearly twelve years, with information during the whole of that peroid of every fact now relied upon by him, the appellee seeks the aid of a Court of Equity to set aside the sale and conveyance and adjudge him to be the owner of the property, and chiefly because of the mistake of an officer in not describing the premises in the advertisement of the sale and in the conveyance so as to properly identify them. In our judgment he is not in a position to claim interference of a Court of Equity." Mr. Justice Harlan also says in another part of the decision, "Is appellee entitled to relief in a Court of Equity in respect to the sale of June 13th, 1870? In Badger vs. Badger, 2 Wallace, 87, 95, it was said that, 'A party who makes an appeal to the conscience of the chancellor should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights and the means used by the respondent to fraudulently keep him in ignorance, and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case on his own showing without inquiring whether there is a demur-

rer or a formal plea of the statute of limitations in his answer.'"

In the light of these authorities and under the proof in the case, what are the rights of the parties? In regard to the undivided half of the premises in controversy obtained by the plaintiff below from the Lockwoods, we think there can be no doubt whatever. The testimony of the Lockwoods themselves clearly shows (see Record ps. 74-75-76-77-78-79) that they had no right, title or interest whatever in the land they conveyed to the appellee in December, 1888. They abandoned the land in 1866 because the claim against it amounted to more than the value of the land. Moreover, they knew of the pendency of the foreclosure proceedings, never paid the taxes on the land and regarded the property of so little value that they never even tried to sell it, but upon receiving an offer of Fifty Dollars ($50) from the appellee, James P. Twohig, for what they considered was of no value to them, they executed a quit claim deed to him for the land in controversy. More than twice the period required by the statute of limitations to bar a proceeding at law or in equity in Nebraska, had elapsed between the time when the Lockwoods abandoned the land in 1866 and when they made the quit claim deed to James P. Twohig in 1888, and in the meantime, without any aid or effort of the heirs or of the appellee, James P. Twohig, the land in controversy had arisen from an insignificant value by the reason of the building of a railroad bridge across the Missouri

River in 1887, and the laying out of a town called South Sioux City near the land in controversy, until it had become very valuable. See Record ps. 30-36-54-60.

The parties agreed among themselves that the value of the eighty acres involved in this suit in July, 1890, was $16,000.00.

Clearly, the Lockwoods would have no rights which they could enforce in a Court of Equity, and if they had no such rights then it follows as a necessary conclusion that the appellee, James P. Twohig, has no rights whatever in or to the land in controversy which can be enforced in equity.

As to the undivided half of land in controversy which the appellee obtained from James W. Virtue, the facts are very much the same except that there is nothing in the record to show that James W. Virtue had any knowledge of the pendency of the proceedings to foreclose the mortgage in the District Court of Dakota County, Nebraska, and nothing to show that he was a party to that proceeding or to any other. He, however, has been guilty of laches substantially as gross as those of the Lockwoods. He left Dakota County, Nebraska, in 1864, knowing that his interest in the land in controversy had liens against it for more than it was worth at the time, leaving other lands in the care and custody of agents, (see Record p. 35-36) and not leaving any agent, so far as the proof shows, in charge of the land in controversy. He knew that there was an unpaid trust deed or mortgage against

the property which was subject to foreclosure; he knew that there were taxes to be paid, yet for a period of twenty-four years he never made any inquiry about the land, never took any interest in it, never looked after it in any way, never paid the taxes or exercised any other rights of ownership, and after it had increased enormously in value, for a nominal sum, to-wit, the sum of $350 (see Record p. 34) executed a quit claim deed for the same to James P. Twohig, the appellee.

These laches of the appellee's grantor, James W. Virtue, are unexplained. His deposition was not taken by the appellee who knew him personally and also knew his residence, which seems to us a powerful circumstance tending to show that the deposition was not taken because Virtue would have said, if put upon the stand, that he had abandoned this property in 1864 and had no right, title or interest in or to it. In the light of Richards vs. Mackall, 125 U. S., p. 183, James W. Virtue could have had no standing whatever in a Court of Equity, and if he could have no standing in a Court of Equity it follows *a fortiori*, that his grantee could have none. Indeed, the attitude and conduct of James P. Twohig, the appellee, appeals even less to the conscience of a chancellor than that of his grantors. He was the Clerk of a Court of Record in which an instrument was filed for the purpose of perfecting the title to another piece of real estate in Dakota County, Nebraska. (See affidavit of Isaac Harter, Record ps. 4-5.) Having dis-

covered a possible flaw in the title to the real estate in controversy, he immediately forms a dishonorable scheme to deprive the owners of the property and to enrich himself at their expense. He accordingly procures for a nominal consideration, a quit claim deed of the premises in controversy, from James W. Virtue, (see Record p. 55) wrote a threatening letter to one of the appellants (see Record p. 27) and shortly thereafter commenced this action for the recovery of the undivided half of the premises in controversy, (see Record p. 4), and while the suit was pending and when he had full knowledge of the claims of the complainants to the land in controversy, procured a quit claim deed of the other undivided half thereof for the nominal consideration of $50.00, although by his own stipulation the property was then worth Eight Thousand Dollars ($8000.00).

We desire further to call the attention of the Court to the fact that there may have been an action commenced against James W. Virtue for the foreclosure of the mortgage and the papers in some manner lost after judgment had been obtained and before record.

See Freeman on Void Judicial Sales, Sec. 8, p. 8, at the bottom of the page to the end of the Section, where it is said among other things, "Where the Court is deemed to be one of general jurisdiction, the presumption is indulged that the missing document originally existed and was sufficient in form and that it has been lost from the files. If a long period has

elapsed between the date of a judicial or execution sale, and the time when its validity is questioned, the presumption that the Court and its officers did their duty is usually indulged and the law is upheld notwithstanding there is no direct or positive evidence of the existence of certain acts prescribed by law." This presumption is strengthened when the documents come from a suspicious source or have been in the custody of a man of doubtful integrity.

We cannot better close this brief than by quoting the language of another which we think is very pertinent to the case at bar, "The security of titles and and the welfare of society are best prompted by closing the doors of the Courts against stale claims which experience has shown spring up at great distances of time. When important witnesses are dead or material evidence is lost or destroyed, these stale claims in many instances are bought up for a trifle or litigated as a speculation and without any real merit in them."

For the foregoing reasons among others, we respectfully submit to the Court that there is no equity in the claim of the appellee to set aside the decree and judgment of the District Court of Dakota County, Nebraska, and the sheriff's deed based thereon, for the reason that there is not in his claim that conscience, good faith and reasonable diligence without which an appeal to equity will not be heard. We further submit that in this case the Court should go further than to enter a decree dismissing the petition of the plaintiff and should in the interests of peace

and of putting an end to litigation, decree the land in controversy to belong to the appellants.

Under a well known principle of equity jurisprudence, the Court having acquired jurisdiction should go forward and finally determine all the matters at issue for the purpose of putting an end to litigation.

Respectfully submitted,

J. H. SWAN, AND
HENRY W. HARTER,

ERRATUM ET ADDENDUM.

1. ERRATUM.

On page 7 of the foregoing Brief near the bottom of the page it is stated that, "in the year 1886, William F. Lockwood and his wife, Mary A. Lockwood, left Dakota County, Nebraska," etc.

In the sentence referred to, "1886" should be 1866. See Record, p. 75.

2. ADDENDUM.

Counsel for appellants through inadvertence, neglected to call the attention of the Court in the foregoing Brief, to the fact that Isaac Harter, the father of the appellants, upon the 27th day of February, 1858, at the time of placing the trust deed in the hands of his attorney, Isaac Powers, in 1876, for foreclosure in the District Court of Dakota County, Nebraska, and at the time of his death, was not a resident of Nebraska, and never had been, but was a resident of Canton, Ohio. See the Record, pages 5, 23, 24 and 38.

Neither Isaac Harter, the father of these appellants, nor the appellants, (See Record, p. 8) were or are residents of the State of Nebraska.

158-448

RECORD CASE No. 14,780.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM NO. 251.

GEORGE D. HARTER, M. D. HARTER, ISAAC HARTER, HENRY W. HARTER, AND LOUISE ORDEAN, APPELLANTS,

VS.

JAMES P. TWOHIG, APPELLEE.

BRIEF OF APPELLEE.

W. E. GANTT, ATTORNEY FOR APPELLEE.

J. T. HENDERSON & COCHRAN, Printers, Sioux City.

IN THE SUPREME COURT OF THE UNITED STATES.

GEORGE D. HARTER,
M. D. HARTER,
ISAAC HARTER,
HENRY W. HARTER, AND
LOUISE ORDEAN,
APPELLANTS.

vs.

JAMES P. TWOHIG,
APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEBRASKA.

BRIEF OF APPELLEE.

STATEMENT OF CASE.

We take exceptions to the statement of the case, made by appellant in his argument. While it is a partial history of the facts, it entirely fails to set out the issues raised by the pleadings, and in order for the Court to arrive at an intelligent conclusion as to what is at issue, it would be necessary for it to make a critical examination of the abstract, and pick from it the points involved.

The action was originally commenced in the State Court, in

Dakota County, Nebraska, and was removed by appellants to the Circuit Court for the District of Nebraska.

The action was brought to redeem, from a sale made under and by virtue of a deed of trust, executed to one, August Kountz as trustee, to secure a note made February 27th, 1858, given by one Eugene L. Wilbur, for the sum of $140.00, due twelve months after date, and bearing interest at the rate of four per cent. a month after due until paid, and secured by said trust deed on the west half of northeast quarter of Section 33, Township 29, Range 9, east. Plaintiff in his petition alleges:

1st. That Isaac Harter died in the month of February, 1876, intestate, the exact date being unknown to plaintiff, and that the defendants herein are the sole remaining children and only legal heirs of deceased and said heirs are all over twenty-one years of age. That the defendant, Isaac Harter, was duly appointed administrator of deceased by the Probate Court of Stark County, Ohio.

Plaintiff alleges that he is the owner of the undivided half of the west half of said northeast quarter of Section 33-29-9. Alleges further the giving of the trust deed to secure the payment of the note hereinbefore set out and described. Alleges that on the 28th day of February, 1876, the said Isaac Harter, deceased, filed his petition in the District Court of Dakota County, praying for a foreclosure of said trust deed and making defendants in the action William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountz, the trustee named in the trust deed. Alleges that at a term of the District Court held in said County, on the 5th day of June, 1870, a decree was entered in said cause for the sum of $1,262.68, which included $14.68 costs, and the premises described in said deed were ordered sold to satisfy the same.

That on the 28th day of June, 1876, an order of sale was issued from said Court to the sheriff of said County commanding

him to sell said premises to satisfy said judgment and costs, and said Sheriff did, on the 12th day of August, 1876, sell said premises to Isaac Harter, deceased, for the sum of $1,200.00. And on the 10th day of May, 1877, a deed was executed by the sheriff of said premises to said deceased.

Further alleges, that on the 2d day of March, 1860, Eugene Wilbur and wife, then owners of said premises by deed of quit-claim, conveyed the same to one William Lockwood, and the deed was duly recorded in Dakota County, on the 3d day of March, 1860. That on the 6th day of February, 1861, said Lockwood and wife, by a warranty deed, conveyed said premises to James W. Virtue; said deed was duly recorded on the 22d day of March, 1861. That on the 3d day of February, 1863, the said Virtue, by warranty deed, conveyed an undivided one-half interest in said land to Mary A. Lockwood. Said deed was recorded on the 5th day of March, 1863. That afterwards on the 3d day of September, 1888, James W. Virtue, by a quit-claim deed, conveyed the premises in dispute in this case to the plaintiff, and said deed was duly recorded on the 22d day of September, 1888.

Further alleges, that at the time of the filing of the petition for the foreclosure of the trust deed, James W. Virtue owned an undivided one-half interest in said premises and was the sole owner thereof from the 6th day of February, 1861, until September 3d, 1888, at which latter date all of his interest in and to said premises were assigned by said deed to plaintiff. That the said James W. Virtue was not made a party to said foreclosure proceedings nor was his rights or ownership in said premises in any manner cut off or barred by said proceedings, nor in any other manner previous to or since said proceedings were had; that said proceedings in no manner affected his rights or the rights of the plaintiff, who holds under him from redeeming said interest in said premises from the lien of said trust deed if any such law exists by virtue of said deed.

Further alleges that the decree and sale are void:

1st. Because the service in said case, upon those who were made parties in said action, was had by publication and the affidavit upon which it is based, was defective, in that it does not set out and describe any cause of action sufficient to show that the plaintiff therein could proceed by publication of summons. That said affidavit is not sworn to by the plaintiff, nor by his attorney in said case; but it is sworn to by one Herman Kountz, who described himself as agent of plaintiff; a copy of the affidavit is attached to and made a part of the petition.

2d. That the petition filed in the said case does not state a cause of action against the defendants and in favor of plaintiff therein.

3d. The notice of publication is void, in that it fails to set out and describe the Township in which the lands affected are situated, also describes, or sets out and refers to a trust deed or mortgage, given November 29th, 1868, while the one set out and described in the petition, and upon which the decree is based, is dated February 27th, 1858; copies of the petition and notice are attached to the petition in this case.

4th. For the further reason that the plaintiff in said case died in the month of February, 1876, and long before the decree was made and no revivor of said proceedings were had before the rendition of said decree; but said decree was rendered in the name of a dead person and all proceedings thereafter had in said case were in the name of Isaac Harter, deceased, and said case was never revived, nor was any attempt at a revivor made in said case at any time. That the deed made by the sheriff of Dakota County was made to a dead person, and was made by the said sheriff without any order from the Court, confirming his proceedings in the sale of the said land and ordering a deed to be made to the purchaser.

Further alleges that the said Isaac Harter did not, before his

death, have either actual or constructive possession of the said premises, nor did any one acting for or through him have any such possession during that time. Nor has the said described premises been in the actual or constructive possession of any one of the said defendants, nor in the actual or constructive possession of any one claiming under or through said defendants, nor have said defendants nor any one acting for them, such possession at the present time.

Further alleges that the only right, if any, that defendants have to said undivided one-half of the premises set out and described in said trust deed is a lien on the same for the one-half of the sum to-wit: one-half of the $140, which the said trust deed was given to secure, with legal interest thereon from the time the same became due and payable, and also for one-half of the taxes paid on the entire tract, described in said trust deed, and interest thereon on all sums paid previous to September 1st, 1879, at the rate of ten per cent., from the date of payment, and on all sums paid after that date at the rate of seven per cent.

Plaintiff prays judgment that the decree and the deed based therein be set aside, and plaintiff be allowed to redeem, upon paying to defendant the amount legally and equitably due them. To the petition defendants file an answer, first containing the usual exceptions to a bill in equity.

2d. Deny that plaintiff is owner of the land in dispute.

3d. Admits that Eugene Wilbur, on the 27th day of February, 1858, was the owner of the west half of the northeast quarter of Section 33-29-9, and on said date executed and delivered to Isaac Harter his note for $140 00, secured by a trust deed on said lands as alleged by plaintiff. Admits that on the 28th day of February, 1876, said Isaac Harter filed his petition in the District Court of Dakota County to foreclose said trust deed, making defendants the parties alleged in said petition, and that a decree was entered as alleged; an order of sale issued and the lands

therein described were sold to Isaac Harter for $1,200.00, and on the 10th day of May, 1877, a deed was executed by the sheriff to Isaac Harter.

4th. Admits, upon information and belief, that on the 2d day of March, 1860, Eugene L. Wilbur executed a quit-claim deed of the land to William F. Lockwood, and the same was duly recorded on the 3d of March, 1860.

5th. Further say that from an examination of the records of Dakota County, they are informed that there is recorded in said office, a quit-claim deed from Eugene L. Wilbur and wife to William F. Lockwood for said premises. That there is also shown on said records a deed purporting to have been executed by William Lockwood and wife to James W. Virtue, also a deed purporting to have been executed by James W. Virtue to Mary A. Lockwood, for the undivided one-half of said premises, and on the 22d day of September, 1888, there was placed upon the records of Dakota County a quit-claim deed, purporting to have been executed by James W. Virtue, and purporting to quit-claim and release to this complainant the undivided one-half of the said premises; but as to whether said deeds were in fact so executed or were executed by the parties who were ever interested or had any title to the said premises, or whether in fact the said premises were conveyed thereby, or whether said James W. Virtue, at the time of the filing the petition for foreclosure of the said trust deed, herein and in said bill of complaint referred, owned or pretended to own or claim any right, title, or interest, in the said premises these defendants have no knowledge save as informed by the bill of complaint of said complainant, and ask the Court to require of said complainant to make such proof thereof as it may be advised is necessary and material therein.

6th. Deny that the said decree of sale and deed are void, for the reasons set forth in the bill of complaint, or for any other reason; but that on the contrary, allege that by virtue of said pro-

ceedings and deed therein set forth they became the owners and entitled to said premises.

7th. These defendants further answering the said bill of complaint, say that on or about the 27th day of February, 1858, one Eugene L. Wilbur, who at that time was the owner of the said west half of the northeast quarter of Section 33, Township 29, Range 9, east, made and and executed to Augustus Kountz a trust deed to the said described land, to secure to Isaac Harter payment of the sum of $140.00, and interest according to the terms of said note, and that the said Engene L. Wilbur failed and neglected to pay and discharge the said note or obligation, and that after making and executing the said note and trust deed as aforesaid, the said Eugene L. Wilbur, long prior to the proceedings instituted for the foreclosure of said trust deed, abandoned the said premises and neglected to care for the same or to pay the taxes thereon, or to protect the same from sale for taxes, and said Isaac Harter was, from on or about the year 1864, obliged to care for, protect, and pay the taxes upon the said premises. That on or about the 28th day of February, 1876, the said Isaac Harter commenced an action in the District Court of Dakota County, State of Nebraska, in which said lands were situated, for the collection of the said note and the foreclosure of the said trust deed upon the said premises, and thereafter such proceedings were had in said District Court; that on the 5th day of June, 1876, a decree was entered and the same was ordered sold to satisfy said amount. That thereafter such proceedings were had under the order of the said Court, that the sheriff of said County did, on the 2d day of August, 1876, sell the said premises in the manner provided by law, to said Isaac Harter, for the sum of $1,200.00, and on the 10th day of May, 1877, the said sheriff made and executed a deed conveying said premises to Isaac Harter, which deed so made, conveying said premises to Isaac Harter, was duly recorded in the County clerk's office, of said County of Dakota, Nebraska, on the.....day of....., 187..,

on page.....of book....., of said records, and that by reason of the said facts above stated, and the said proceedings and the said deed so made and recorded, the said Isaac Harter became the owner and entitled to the full and exclusive use and ownership of the said premises.

8th. These defendants further answering and for defense to the said complainant's bill, say that the cause of action therein stated did not accrue at any time within ten years next preceding the commencement of the the plaintiff's action.

9th. These defendants for further defense, to the said complainant's bill of complaint, say that in 1858, at the time the said trust deed was given upon the said premises to secure the said sum of one hundred and forty dollars ($140.00), due to the said Isaac Harter, the said west half of the northeast quarter of Section 33, Township 29, Range 9, east, was of little value and not worth more at that time than the said indebtedness which the said trust deed was given to secure; that from that time for more than twenty-seven years, the said lands remained of little value, and was not worth and of the value of the amount due thereon necessary to pay to redeem the same; and that since the year 1864, the said maker of the said mortgage and all of said assignees fully and totally abandoned the said lands and the title thereto, and have wholly failed to pay and discharge the taxes and other obligations upon the said premises, and since the year 1864, and up to the year 1888, made no claim, or have they offered in any manner to care for or pay taxes upon the said lands, or redeem the same from said indebtedness or from said sale, or to have or to exercise any care, custody, control or claim upon the same in any manner whatever, and that during all of the said time said plaintiff, and those under whom he claims title, have stood by, made no claim, given no notice or taken any measures claiming or showing that they intended to claim the said land or that they had any interest therein. That during all of said time these defendants

have had the care, custody and possession of the same, and have paid the taxes each and every year thereon; that during all the said time, and up to about the year 1887, the said premises continued to be of comparatively small value, and during all of said time these defendants continued to hold and care for and pay the taxes on the said land, that being the only compensation received; or that they were enabled to obtain as payment of the debt owing thereon; and during all of said time, the said parties from whom the plaintiff claims to have obtained a deed, made no claim to any title or interest therein, but left the same wholly to these defendants, and wholly abandoned the said premises and all claim thereto, and refused to care and protect the same from sale, or to pay the taxes thereon, or to have any further use or care in connection therewith; that during all of said time the said record title of the said premises was in these defendants and they were in the care, custody and control of these defendants, who have since said time laid out and expended in the payment of taxes upon the said land, and the care and custody thereof, large amounts of money and time. That by reason of said acts, omissions, silence and gross laches, the said parties, under whom the plaintiff claims title, their claim to the said premises became stale, and they were barred and estopped from asserting the same or transferring any claim or interest therein, and this plaintiff is now barred or estopped from claiming any estate or interest in or to the said premises.

10th. That during the last two years, by reason of the improvements made in the vicinity of said land, the same has become of great value, and this plaintiff, James P. Twohig, well knowing the recent rise in value of said land, and well knowing that the said Eugene L. Wilbur, William F. Lockwood, Mary A. Lockwood and James W. Virtue had long ago ceased to have any care of or to in any manner protect the same or pay any taxes thereon, and had wholly abandoned the same to these defendants and that these defendants had, for the last twenty-four years,

cared for and protected the same and paid the taxes thereon, fraudulently contriving and conspiring how he might injure and defraud these defendants fraudulently and wrongfully as these defendants are informed and verily believe obtained from the said James W. Virtue the quit-claim deed for a mere nominal consideration, for the purpose of harassing and injuring these defendants, and defrauding them of the said property, to which in justice and good conscience they are fully entitled. And these defendants are informed and fully believe that the said plaintiff has no other interest in said premises save what he may acquire hereafter in prosecuting this litigation, and that he wrongfully took and procured the said deed purely as a speculation, with the unjust and wrongful intent to deprive these defendants thereof, and that by reason thereof and of the gross laches of those from whom he received the same, he is estopped and barred from prosecuting his claim thereto.

12th. And these defendants deny all the said bill charged, without this, that there is in any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is not true to the knowledge or belief of this defendant, all of which matters and things this defendant is ready and willing to aver, maintain and prove as this honorable Court shall direct, and humbly prays to be hence dismissed with the reasonable costs and charges in this behalf most wrongfully sustained.

To the answer, a replication in the ordinary form was filed by the plaintiff. After the taking of the testimony, it appearing that Isaac Harter, plaintiff in the action, brought in the District Court of Dakota County, on the 28th day of February, 1876, had died previous to the commencement of said action, the petition, by agreement of parties, was amended to conform to the proof. See stipulation, on page 33 abstract. The case was submitted to

the Court and a finding made in favor of appellee; but before the decree was entered, appellee having become the owner of the remaining undivided half interest in the land, asked and obtained leave to file a supplemental bill or petition, setting forth this fact. In his supplemental bill he alleges:

"The plaintiff, James P. Twohig, a resident and citizen of the State of Nebraska, by leave of Court, files this his supplemental bill to his amended bill of complaint against George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, Louise Harter, intermarried with Albert L. Ordean, and Isaac Harter, administrator of the estate of Isaac Harter, deceased, all residents and citizens of the State of Ohio.

And thereupon complainant states that on the 27th day of December, 1888, the complainant herein filed his original bill in District Court of Dakota County, Nebraska, and that thereupon and within the proper time said respondents removed said cause to this Court, and after said removal, by stipulation of parties, said original bill was amended in this, to wit, to show that Isaac Harter, deceased, died on the 27th day of February, 1876, and before the action was commenced in the District Court of Dakota County for the foreclosure of the deed of trust set out and described in said bill.

Complainant states to the Court that said original and amended bill prayed that the decree entered in the case brought in the District Court of Dakota County might be set aside and complainant be allowed to redeem the undivided one-half interest in the lands set out and described in said original and amended bill upon the payment to respondents of the amount legally and equitably due them on the deed of trust set out and described in *in* said original and amended bills.

Complainant states that respondents, having been duly served with process in said case, appeared and filed their answer to said original and amended bill, and complainant replied to the

said answer, and the evidence was taken and the case submitted to the Court, and the Court found in favor of the complainant, and that the proceedings had in the District Court of Dakota County were absolutely void and of no effect, and that this complainant had the right to redeem the undivided one-half of the west half of the northeast quarter of Section 33, Township 29, Range 9, east, from the lien of respondents' deed of trust upon the same, upon paying to them the amount due them thereon; also upon the payment of the sums paid as taxes upon said described lands by said respondents, but no decree has been as yet entered upon said findings.

Complainant further states that since the filing of the bill as aforesaid, he has become the owner of the other undivided one-half interest in said described land, and now is and ever since on or about the 28th day of January, 1889,—the sole owner of the west half of the northeast quarter of Section 33, Township 29, Range 9, east, and as such owner is entitled to redeem the whole of said described land from the lien of said deed of trust.

Wherefore complainant prays that the decree of the District Court of Dakota County and the deed based thereon may be set aside and complainant be allowed to redeem, upon paying the respondents the amount legally and equitably due them, and complainant's title to the whole of said described lands covered by said deed of trust be quieted in him."

Previous to the filing of the supplemental bill, the case had been referred to Elmer D. Frank, as commissioner, to report the facts to the Court, which report was made, and the same will be found on pages 61 to 65 of abstract. After the filing of the supplemental bill and the taking of additional testimony, the case was again submitted and referred to the same commissioner for a supplemental report, which was made, and will be found on pages 67, 68 and 69 of abstract. Though both the reports made by the commissioner were in favor of appellee, no exceptions

were taken to the findings of fact so made, and no motion was made to set them aside; and upon these reports and the finding of the Court, made on the 1st day of July, 1890, and found on page 66 of abstract, the final decree, set out on page 82 of abstract, was based; and from this final decree a general appeal is prosecuted by the appellants; and from that part of the decree allowing interest at the rate of four per cent. a month, an appeal was taken by appellee.

This statement is somewhat full, but it appears to us that in order to bring all the points involved, to the attention of the Court, it is necessary to thus set it out.

ARGUMENT.

In the argument of the case we will, to some extent, review the testimony, and see if it in any manner supports the contention of appellants, as claimed in their specifications :

The proof shows that at the time of the commencement of the proceedings, in the District Court of Dakota County, Nebraska, for the foreclosure of the trust deed, the plaintiff, Isaac Harter, in said case, was dead. Said case, as shown by the records of said Court, introduced in evidence, having been commenced on the 28th day of February, 1876. The testimony of Isaac Harter, Jr., shows that Isaac Harter, deceased, plaintiff in the case, in Dakota County, died on the 27th day of February, 1876, and that he was the father of witness. That all the right or claim that appellants have to the land in question, are based on the proceedings had in the name of this plaintiff, who died before the commencement of the suit, and as further testified to by this witness, by reason of the payment of taxes by Isaac Harter, in his lifetime, and before any steps were taken to foreclose the trust deed ; and the payments made after their father's death, and after the proceedings were had in said

court by the father of the appellants in this suit. The testimony of this witness shows that their claim is based entirely on the foreclosure proceedings, the receiving and recording of the sheriff's deed based on the same ; the payment of taxes by Isaac Harter, in his lifetime and before any proceedings were commenced. The further payments, made by these appellants, after the death of Isaac Harter, Sr., and after the foreclosure proceedings were had, claiming title to the land and offering the same for sale ; and the claim that the land had been abandoned by plaintiff and his grantors since 1862, which claim is based upon the fact of non-payment of taxes by these parties. This witness testifies further that neither Isaac Harter in his lifetime, nor any of his heirs claiming under him, nor any one representing them were ever in the manual possession of the land, the evidence on this point is, witness was asked the question : Is, or is it not the fact that you and the defendants in this action claim all the interests you have or claim to have in the land in suit, solely as the heirs at law of Isaac Harter, your father, under the sheriff's deed made to him under said decree of foreclosure before referred to ? Ans. We do claim the land in suit as heirs at law, of Isaac Harter and under said sheriff's deed, but that is not our sole claim to said land, as we claim it on other grounds. We claim we have paid the taxes on the land for more than ten years since the deed to my father was placed on record by his heirs, and we therefore claim title by adverse possession. We further claim the land because both Virtue and Lockwood, many years ago, abandoned the land, and we have been paying taxes, by reason of that abandonment, since 1862, to my own knowledge, for which we hold receipts for nearly every year.

Q. Has ony one of the defendants ever been in actual possession of said land, or in any way improved the same ?

A. Neither of the defendants nor the plaintiffs, nor their predecessors, have been in the actual manual possession of the land, as the land is unimproved land, and the only acts of pos-

session exercised on the land since 1862, have been acts done by my father and his heirs, such as the payment of taxes, the open claim of ownership and the open attempts to sell the land by us since the death of my father.

The cross examination of this witness discloses the same facts, and the testimony given by appellees' witnesses shows that the land in dispute has never been in the manual possession of any one. The payment of taxes, by Isaac Harter, from 1862, up to the time of the bringing of the action in Dakota County, would have no effect on the case, as it could only have been done voluntarily, in which event it would not give these defendants even the right to recover them back.

In Homestead Company vs. Valley R. R., 17th Wallace, 133, it is said: "A party who has no title to lands cannot acquire one by mere payment of taxes on them. A party by paying taxes which another party ought to pay, but does not pay, cannot make such second party his debtor by having stepped in and paid the taxes for him without being required to do so." See also case of Gauigan vs. Knight, 47th Iowa, 525; but in the case at bar it will be said that defendants had a right to pay these taxes to protect their security. This is true as a general principle, but cannot have any application to this case for the reason that it is shown by the petition for the foreclosure of the trust deed and the other proceedings which were had in the District Court of Dakota County, and which are in evidence on the part of appellee, that no attempt was made in that case to include these taxes in the foreclosure proceedings, and having failed to include them they are cut off from afterward, in any manner, recovering them. Johnson vs. Payne, 11th Neb., 269; Young vs. Brand, 15th Neb. 601. The same rule would undoubtedly apply to the payment of taxes made since the proceedings were had in the District Court, for it is contended on the part of appellee that these proceedings are void, and that being the case, taxes paid under a void claim of title cannot be recovered under the decision from 17th Wal-

lace, cited above, much less can this payment be a basis for a claim of adverse possession.

The evidence fails to show any laches on the part of appellee or his grantors; as there is no dispute over the fact that this was wild unoccupied land, never in the manual possession of any one, and as to the claim of abandonment, it is sufficient to say at this place that this being unoccupied land, and appellee and his grantors, as shown by the testimony, having the legal title thereto, there could be no abandonment on their part, and they could be divested of their legal title only by deeding the land in the manner provided by law; by an actual adverse possession, or by proceedings in a Court that had acquired jurisdiction of both the persons of defendants and the subject matter of the case.

This is sufficient on the question of testimony, and as there were a number of points raised in the trial Court regarding the jurisdiction of the State Court, in the action to foreclose the trust deed, which were not passed upon, we will next draw the attention of the Court to them:

The first point is to the affidavit for service of summons. After stating title of case and venue, it says: "Herman Kountz, being duly sworn, says he is the agent of the plaintiff in the above entitled action, that the defendants therein are and each of them is a non-resident of this State and cannot be served with summons therein; that said action is brought to foreclose a mortgage and for a sale thereunder of lands situated in the County of Dakota, in the State of Nebraska. Subscribed and sworn to before a Notary Public." A copy of this is attached to the petition and printed on page 39 of abstract, the "Exhibit A" attached on page 4 being wrong. The reading of this affidavit will show that it is bad on two grounds. 1st. It does not set out and describe any cause of action in which service may be had by publication. See form of affidavit in Maxwell's Pleading, 4th ed., page 80, and cases cited. It fails to show that a petition has been filed in any Court

having jurisdiction of the subject matter of the action, or to give any description of the lands to be affected. Iu fact it is entirely lacking in all of the facts necessary to give the Court jurisdiction. It is bad because it does not show that it is made by any one authorized to make it. Section 78, compiled statutes of Nebraska, 1887, which was in effect at the time this affidavit was made, provides that publication may be made upon the filing of an affidavit, showing that service of a summons cannot be made within the State, and that the case is one of those mentioned in section 77. It will be noticed that this does not state who shall make this affidavit, and though it has never been passed upon by the Nebraska Court, as to whether or not, no provision being made for any one but the plaintiff to make it; it can be made by any one else. Yet admitting that in a proper case the affidavit for publication can be made by the attorney or agent of the plaintiff, this affidavit is void as shown on the face of it, for the reason that the only authority for the making of it by an agent is found in section 120, code of 1887, which provides: "When the affidavit is made by the agent or attorney, it must set forth the reason why it is not made by the party himself." This section further provides when the affidavit may be made by the agent or attorney. It is true that this section only applies to the verification of pleadings, but we think that it is to be construed in connection with section 78, and if this is done, then this affidavit is void, as it sets out no ground or reason why it is not made by plaintiff, and if these sections are not construed together then the affidavit is clearly void, for the reason that it is not made by an authorized person, and if it is void, all proceedings had under it are void.

Manley vs. Healy, 10th Kan., 88.

The notice published in the case is peculiar. A copy is attached to the petition. It reads: "Take notice that you have been sued, by Isaac Harter, in the the District Court of the State of Nebraska, for the County of Dakota, and that you are required, on the 10th day of April, 1876, to file your answer to this petition,

filed in the clerk's office of said Court. The object and prayer of said petition is the foreclosure of a mortgage or a deed of trust, made by Eugene L. Wilbur, to said Kountz, as trustee, on the 29th day of November, 1868, conveying the west half of the northeast quarter of section 33, in said County, to recover a note made by said Wilbur to said Harter on the same day, for $140.00, with interest from maturity until paid, at four per cent. a month, and for a sale of said mortgage premises and other relief." The notice is void: 1st. Because it entirely fails to describe the land. The description being west half of northeast quarter of Section 33, in Dakota County, no Township and no Range being mentioned, and as there are a good many Section 33's in Dakota County, it can hardly be claimed, by the most sanguine person, that this description amounts to anything, as a notice or otherwise. Such a description in a deed would make it absolutely void; for uncertainty, see Tiedeman on Real Property, section 827, and cases cited, Freeman on void judicial sales, section 11, Fraser vs. Steenrod, 71 A. D., 447.

Now, this being the case in a deed where everything is construed in favor of the deed, how much more does it apply in the case at bar, where the whole proceeding is based on the authority given by the statute for the foreclosure of the mortgage in this manner, and in which all authorities agree, that in order to give the Court jurisdiction, the statute must be strictly followed. See section 79, page 750, compiled statutes of 1887, as to what the notice must contain. The notice is bad under this section, for the reason that the petition sets out and describes a mortgage, given on the 29th day of February, 1858, while the notice says the object and prayer of the petition is to foreclose a mortgage, given on the 27th day of November, 1868, and the decree and sheriff's deed is based on the foreclosure of a mortgage, given February 27th, 1858.

Virtue was not made a party to the suit; there is no dispute that at the time of the foreclosure proceedings, James W. Virtue

was the owner of this land, which he has since deeded plaintiff, and that he was not made a party to the suit nor has his interest been in any manner affected before or since said time. That he was a necessary party, and that his interest could in no manner be affected without his being made a party. See Jones on Mortgages, vol. 2, sec. 1406, and cases cited. Grantee of mortgages must be made a party. Note to Childs vs. Childs, 75th A. D., 517; Goodenow vs. Ewen, 76th A. D., 550, note.

The bill alleges that the petition for the foreclosure of the mortgage or trust deed does not state facts sufficient to constitute a cause of action. The petition shows on its face that at the time the foreclosure proceedings were had, that the lien on the land was lost by reason of the running of the statute of limitations. The fact that the defendants in that action were not residents of the State, could have no offect, as the proceeding for the foreclosure of a mortgage is *in rem* and governed by section 17th, page 742, compiled statutes of 1887. This section has been construed by the Supreme Court of Nebraska, as applying to mortgages and deeds of trust.

Hurley vs. Estes, 6th Neb., 386.
Hurley vs. Cox, 9th Neb., 230.
Also, 5th Neb., 89 and 465.

This being the construction placed on a state statute by the Supreme Court of the State, it will be followed by the Federal Courts. "A purchaser of the equity of redemption may interpose the defense of the statute of limitations to the foreclosure of a mortgage, whether the mortgagor does or not."

Jones on Mortgages, vol. 2, sec. 1207.
Schumacher vs. Seibert, 18th Kan. 104, page 110.
Day vs. Baldwin, 34th Iowa, 380.

It may be said as against this branch of the case, that appellant comes into Court and offers to redeem, this is true, but his allegation is to redeem from the lien of the trust deed if any

such lien exists, and if this Court should decide that this lien did not exist at the time of the foreclosure proceedings, then there is nothing to redeem from, and he holds both the legal and equitable title to the land, by virtue of the deed from Virtue and Lockwood, and all that appellants could justly claim from him would be the taxes paid, provided their foreclosure proceedings were valid, notwithstanding this offer; but we think it has already been shown that they acquired no right under the foreclosure, and "this being the case under the authorities quoted in the first part of the argument as to the voluntary payment of taxes, conferring no right to recover them back ; that they cannot even recover them back, and the court should now so decide.

The next proposition is the allegation, that before the rendition of the decree and making of the deed, plaintiff in the case, in Dakota County died, and no revivor of the action was had in the name of his legal representatives. The proof is stronger than the allegation, as it shows he died the day before the action was commenced, and by the stipulation the bill stands amended to conform to the proof. So we have the anomaly of a proceeding to foreclose this mortgage, and upon which all the rights that defendants can claim are based ; brought in the name of a dead man by an attorney appointed by him in his lifetime, and whose authority to take a single step in the case had been terminated by the death of his client.

See Weeks on Attorneys at Law, section 256, where it says: "The relation is also totally dissolved by the death of the client."

Gleason vs. Dodd, 4th Metcalf 333.
Risley vs. Fellows, 10th Ill., 531.
Judson vs. Love, 35th Cal., 463.

This attorney prepares a petition and signs it as attorney, and the same is sworn to by one Herman Kountz, who says he is the agent of the plaintiff, on the 21st day of February, 1876. On the 27th day of same month the proof shows plaintiff died.

On the next day after his death and when all authority had been revoked by reason of the death of the client, the attorney files the petition in the District Court ; at the same time filing the affidavit for publication which has already been noticed in the argument and which was sworn to by the same party at the same time, and seven days before the commencement of any action, and then this suit, commenced without any authority, is prosecuted to a decree, a sale had under the same, and the sheriff, after selling the land to the deceased person, without any authority from, or order of the Court, proceeds to execute a deed of the premises to the deceased person, and upon this deed to a dead person, founded on a proceeding brought and prosecuted by an attorney, absolutely without authority to take a single step in the case, is the claim of defendants in the case at bar founded.

It would seem unnecessary to quote authorities to show that these proceedings are absolutely void, and that no title can be based upon a deed executed under such circumstances.

In the following cases, deeds made to a dead or fictitious person are held *nullities :*

Hunter vs. Wallace, 12th Cala. 363, 73, A. D. 543, 14th Mich., 225.

Thomas vs. Wyatt, 69th A. D. 446.

Davenport vs. Lamb, 13th Wallace, 418, on 427.

18th Federal Rept., 273, on 276.

3d Washburn, 4th Ed., 265.

Muskingum Valley Turnpike Co. vs. Ward, 13th Ohio, 120.

4th Gilman, Ill., 175.

Thomas vs. Wyatt, 25th Mo., 26.

Galt vs. Galloway, 4th Peters, 332.

Galloway vs. Finley, 12th Peters, 297.

7th Peters, 222; 6th Peters, 261.

Sheriff's deeds are to be construed same as others, 3d Otto, 514

Proceedings carried on in the name of a dead person are void, and it matters not whether it be the plaintiff or defendant, without a revivor of the action, for or against the proper representatives, they are absolutely void, whether attacked directly or collaterly.

Stymunds vs. Brooks, 10th Wend., 207.
Hildreth vs. Thompson, 16th Mass., 191.
Maine vs. Gong, 2d Ohio, 287.
Ennis Seyers vs. Dunckes, 4th Howard U. S., 58.
Brown vs. Packer, 15th Ill., 307.
Rohrer on Judicial Sales, 2d ed., 326.
Myers Fed. Dec., vol. 20, sec. 1478.
Mitchell vs. St Maxent, 4th Wallace, 237, 20th M. F. D., seç. 1479.

Where a plaintiff, in a foreclosure proceeding, dies before judgment, it cannot be perfected in his name.

Geny vs. Post, 10th Howard Pr., 118.
Taylor vs. Elliot, 52d Ind., 590.

The cases cited show that a judgment rendered in a case, where the defendant or plaintiff died after the instituting of the suit, but before judgment was rendered for or against; that the judgment was void, and no rights founded upon it would be upheld. But in this case we go farther and attack a decree and a deed based upon a sale under it, in which the plaintiff, as far as the case was concerned, did not exist, having died before the same was instituted; there is no dispute amongst the authorities on this proposition.

In case of McCracken vs. Reall, 3d A. K. Marsh, the Court says: "Indeed we cannot imagine how it is possible for any act, necessary to the acquisition of rights, to be done in the name of a dead person, and at the same time have any legal operation; after the decease the dead person has no right and no rights can be acquired by others in his name."

In the case of Bauman vs. Kelly, 36th N. W. R., 334, (Minn.), the matter came up in a case wherein foreclosure proceedings were had under the statutes of that state, giving power to foreclose a mortgage by advertisement. The mortgagee had died before the same took place. The notice was given in the name of a dead person. The Court says: "The foreclosure proceeding was wholly without authority and void. Hall, the mortgagee, being dead, could neither exercise the power of sale nor confer authority upon another. A notice in his name and purporting to be by his authority could be of no legal effect. His name had no potency after he had ceased to exist." To the same effect is White vs. Sear, 58th Iowa, 533. A judgment rendered against a party, in an action commenced against him after his death, and where no service of process was made upon him in his lifetime, is absolutely void.

Loring vs. Folger, 7th Gray, 505.
Neade vs. Ute, 75th Va., 48.

In the case of Jones vs. McMurtry, 20th Kansas, 189, an attempt was made to commence an action. The plaintiff filed a petition precipe affidavit for order of attachment, and undertaking, and the clerk issued summons and order of attachment; but before any service of these papers was made on the defendant the plaintiff died. After his death these papers were served and defendant's property was seized. The whole proceeding was held void, and Judge Valentine, who wrote the opinion, says, on page 193: "There must always be two parties to a law-suit—a plaintiff and a defendant. No action can exist without such parties. A plaintiff voluntarily makes himself such by commencing the action. A defendant, unless he voluntarily appears, can be made such party only by the service of a summons upon him; and until the service of the summons no action exists. The service is a jurisdictional matter. But suppose before any defendant is created the plaintiff dies. Then can a defendant be created with no

plaintiff in existence? Can there be a defendant in an action without a plaintiff? Such a thing would seem to be absurd. When the plaintiff in a contemplated action dies, the power to make a defendant in that action—*in that plaintiff's action*—is futile and ridiculous. In some cases *after jurisdiction has been obtained*, and some particular proceeding has been commenced before the death of either party, such particular proceeding may be carried on to completion after the death of one or both of the parties, the whole thing relating back to the time of the commencement of the proceeding. This is illustrated by sale of property, on execution after the death of one of the parties, where the property was levied on under such execution before such death; but we know of no case where it has been held that a defendant may be made to an action where there is, at the time, no plaintiff."

This would seem to be a sufficient answer to this; but we may say further that an examination of the cases cited by appellants shows that in all of these cases, jurisdiction was obtained by the Court during the lifetime of the parties, to the action by a proper service on the parties; and in none of these cases, and for that matter, in no case yet decided by any Court, has it been said that a proceeding commenced after the death of the plaintiff, and where service had not been made on defendant in plaintiff's lifetime, gave the Court jurisdiction to proceed in the matter; if the proposition contended for by defendant is true where he says: "When therefore the land was sold, it was sold by the Court, the Court passing the title to the purchaser, and the only interest or right which the defendants had was the right to apply to the Court for any surplus which might have remained, after the Court had finally closed and confirmed the sale made by it, and it did not lie with them to object to the capacity of the Court's grantee to take title," then it would only be necessary, in cases of this kind, for the mortgagee to maks an *exparte* application to a Court that had jurisdiction of the subject matter, for a sale of the mortgaged premises, and on this application, the Court would have the

power to order a sale, without any reference to the rights of the owner, and when a return was made of a sale, the Court could order a deed, and forever cut off any rights of the owner in the premises.

In Richards vs. Thompson, et. al., 23d Pac. Rep., 106, the facts are substantially as follows: "On December 20th, 1873, and prior thereto, Robert H. Thompson owned the land in controversy, and on that day mortgaged it to John G. Tucker, to secure the sum of $200.00, to become due on February 25th, 1876. Robert H. Thompson died at Warner, in the State of New Hampshire, intestate, leaving as his sole heir his father, Robert Thompson. On August 8th, 1877, the mortgage debt being overdue, and the mortgagee having no knowledge of the death of Robert H. Thompson, such mortgagee commenced an action in the District Court of Sumner County, to recover the mortgage debt, and to foreclose the mortgage, making Robert H. Thompson, and him alone, the defendant. Service of summons was obtained by publication, and the foreclosure proceedings, were carried on to final consummation; and on September 7th, 1878, a sheriff's deed was executed under the foreclosure proceedings to Christiana Tucker, for the property in controversy, and on the same day this deed was recorded. Also, on the same day, a tax deed was executed to Christiana Tucker, for the same property, on a tax sale made on September 7th, 1875, for the taxes of 1874. The defendant's title to the property in controversy is founded upon the aforesaid sheriff's deed and tax deed; and the defendants, with their grantors, including Christiana Tucker, have held the possession of the property under such sheriff's deed and tax deed, continuously, since about the time such deeds were executed.

Sometime in the spring of 1885, A. A. Richards, an attorney at law, at Wellington, Kansas, was informed by some person that the title to the property in controversy, as held by Christiana Tucker and her grantees, was not good; and from that time on, until November, 1885, he made extraordinary effort to ascertain

who held the adverse, and, as he supposed, the better title, when finally he ascertained, as he believed, that the adverse and paramount title was in the aforesaid Robert Thompson, of Warner, N. H. After some correspondence between Richards and Thompson, Richards wrote to Thompson, as he states in his testimony, as follows: "I had made two propositions to him: That I would carry the suit through the District Court and the Supreme Court for $1,000.00; or, if he did not want to do that, I would divide the cash proceeds of the litigation. He wrote to me, and notified me to bring the suit, and he would let me know about the terms afterwards." In pursuance of this correspondence, and on December 18th, 1885, Richards brought this action in the name of Thompson, as plaintiff, signing the petition as follows: "A. A Richards, Attorney for the Plaintiff." On January 7th, 1886, Thompson executed a deed for the property to Richards, the consideration therefor being $600.00. The property was then and is now worth about $10,000.00. Since the execution of the last mentioned deed, Richards' name was substituted for that of original plaintiff, Thompson, and the action has since that time been carried on and conducted in the name of Richards as the plaintiff.

The objections urged by the plaintiff, against the sheriff's deed, are as follows:

First. All the foreclosure proceedings, upon which the sheriff's deed is founded, took place long after the death of Robert H. Thompson, the mortgagor, and the only defendant in such foreclosure proceedings.

Second. No summons was ever issued or served in the foreclosing proceedings. The service, however, was by publication.

Third. There was no foreclosure decree in the foreclosure proceedings. It would seem from the record that this is a mistake.

Fourth. The sheriff's deed was executed on September 7th,

1878, upon a judgment stated in the sheriff's deed to have been rendered on November 15th, 1878. The judgment was in fact rendered on November 15th, 1877.

The first objection urged against the sheriff's deed, we think, is sufficient. In this state a mortgagee has no title or estate in the mortgaged property. The whole title and estate remains in the mortgagor, and the mortgagee obtains nothing but a lien upon the mortgaged property to secure the payment of his debt; and when he forecloses the mortgage, the foreclosure is in the nature of a personal action, as against the mortgagor, to recover the mortgage debt, with the additional remedy to enforce his mortgage lien. He obtains a personal judgment against the mortgagor for the amount due on the mortgage, with an order that the mortgaged property shall be sold to satisfy the judgment, and that, in case the mortgaged property does not satisfy the judgment, then that a general execution may be issued for the remainder. Of course, he may make other persons than the mortgagor —persons who are interested in the mortgaged property—parties to the action; but, if he does not do so, then the foreclosure proceedings as to such other persons will be void.

In the present foreclosure action, Robert Thompson was not a party; but the only parties were the holders of the mortgage, as the plaintiff, and Robert H. Thompson, the mortgagor, the only defendant in the action, was dead long before the foreclosure action was commenced; this we think rendered the whole of the foreclosure proceedings absolutely null and void. In this connection, see Green vs. McMurtry, 20 Kan., 189. Under the laws of some of the States, where the mortgagee has the legal title to the mortgaged property, and where he may take the possession of the mortgaged property after condition broken, and where he may have a strict foreclosure of his mortgage, this might be different. But our laws will not tolerate these things. We think the sheriff's deed is void; and, as none of the proceedings, upon which the deed is founded, were against Robert Thompson, the real

owner of the property, we do not think that any statute of limitations has so run as to make the deed good, as against him or his grantee, Richards. Indeed, all the proceedings anterior to the sheriff's deed, and upon which it is founded, are also void. They never had the slightest validity as against any person."

This case was not strengthened by the tax deed, as it was also held bad. In this case it will be noticed that the party went immediately in possession of the land in dispute, and was in the possession in 1885, when the action was commenced. This case is decided on the ground, that the defendant being dead when the action was commenced, and being under a law the same as that of Nebraska, that the legal title to the land remained in the mortgagor. The proceedings were void.

The next case is Reily, et. al. vs. Hart, Supreme Court of N. Y., reported in New York Supplement, vol. 8, No. 7, page 717, and being an action for the specific performance of a contract. An agreement had been made by which the defendant had agreed to purchase certain premises from the plaintiff. Plaintiff's title was based on the foreclosure of a mortgage on the premises, the facts being that in 1874, the premises were owned by one Bartholomew Lynch, and there was a mortgage held on them by one Caleb Cogswell; Lynch was a non-resident. In the latter part of the year 1874, Cogswell commenced a foreclosure proceeding against the premises, by publication, and after about one-half the time required to complete a service in this way had elapsed, plaintiff died. The publication was completed in the name of the dead plaintiff, and after its completion, the action was revived in the name of his personal representative. Decree rendered, property sold, and plaintiff holds under the sale. The Court says: "Did such publication of the summons, subsequent to the death of the plaintiff in the action, constitute a sufficient service on the defendant, Lynch, and give the Court jurisdiction to make the judgment of foreclosure against him? If it did, then the title of the plaintiff is merchantable, and the defendant must complete his

purchase and perform his contract. If such service was incomplete and insufficient, then the defendant must have judgment for the cancellation of his contract, and the return to him of the sum of $300.00, which he has paid on the contract. The service was plainly incomplete at the time of the death of the plaintiff, and therefore no action had been commenced and none was continued. The defendant therefore should have judgment."

We have extended the argument on this branch of the case to quite a length, for the reason that it is one of the most important points involved, and it is the principal point upon which the decision of the lower Court is based.

Appellants plead the statute of limitations, that they have been in the open manual possession of the land for more than ten years, and rely upon it in their argument. The evidence shows that the land is unimproved and has never been in the manual possession of any one. Their right to possession is based on the payment of taxes for a number of years, and the offering the land for sale; we have already shown that this payment of taxes does not even give them the right of an action to recover it back. See case from U. S. Supreme Court, cited above. In addition; that the payment of taxes is no evidence of adverse possession. See

S. C. & I. F. Town Lot Co. vs. Wilson, 50th Ia., 422.
Keane vs. Connover, 21 Cal., 291, 82d A D. 744.
Raymond vs. Morrison, 59th Iowa, 371.

Claim of title for 35 years by a mortgagee coupled with the payment of taxes during all of the time the offering of the land for sale, and a sale of a part of it without evidence of actual manual possession held in the case of Locke vs. Caldwell, 91st Ill., 417, not sufficient to show adverse possession. In the case last cited the mortgagee was allowed to foreclose his mortgage for the reason that mortgagor had been absent from the State during most of the time, and the Illinois statute of limitations has a clause preventing the running of the statute in such cases during

time defendant is absent from the State, the opposite being the rule as shown above in Nebraska.

In addition to this, on this point appellants, in their argument, on pages 10 and 11, of brief, put considerable reliance on the proceedings that were had in the action for the foreclosure of the trust deed in 1876, and endeavor to make it appear that the statute would run from that time; but they altogether lose sight of the fact, that owing to the death of plaintiff, in that case, prior to the instituting of the action, all these proceedings were absolutely void. This legal proposition, while it is perhaps good, has no facts in this case to support it, the matters shown by the evidence are not irregularities; but an entire want of jurisdiction on the part of the Court in that case; to proceed in the matter, owing to the fact that the nominal plaintiff in the case died before the commencement of the action; there never was a case before the Court. Hence it is impossible to apply the rule contended for by appellants. See cases already cited on the branch of the case argued above.

The next point upon which appellants rely is that of abandonment. The evidence shows that appellee has the legal title from his grantors, Virtue and Lockwood. That neither he or they have ever, in any manner, been divested of it, either by their own act, by a judicial proceeding, or by adverse possession.

Now we may say that it is an elementary principle, that a party holding the legal title to the land cannot divest himself of the title, and the right to reclaim it, by anything short of a deed conveying his interest, and no claim by any one, under color of title, or in any manner exercised by another, can preclude him from exercising his right to the possession of it, except the party claiming adverse title, can show that he went into the actual adverse possession, and retained such possession for the full statutory time necessary to give him title under the statute of limitations, and in the case at bar, the evidence discloses that defendants never took possession under their claim of title.

This is fully supported by the following authorities:

Washburn on Real Property, 3d ed., page 60 to 66, inclusive.
Tiedeman on Real Property, 559 to 562.
Warvelle on Abstracts, sec. 16.
Note to Wyman vs. Hurlburt, 40th A. D., 466.
Tipton vs. Martin, 12th Pac., 244.

An examination of the authorities cited by appellant will show that in the cases cited, the party who had abandoned the premises had only been in possession under a claim of title, and in none of the cases cited, is it shown that the question of abandonment was passed upon, as against the party holding the legal title, and the cases further show that the party claiming title had entered into the actual possession and held the same adversely for the full statutory period of limitations.

In our review of the testimony we did not refer to the witness, W. F. Lockwood and his wife, as it was taken on this question of abandonment and can more appropriately be noticed here.

Wm. F. Lockwood testifies at great length, showing that the land had been deeded in the first instance to this man, Lockwood, subject to the trust deed by the grantor in said deed, and that said Lockwood deeded the same to James W. Virtue, who afterwards, at his request, and in the winter of 1863, conveyed an undivided half of the land to Mary A. Lockwood, his wife. The deposition further shows that the title to this undivided half interest remained in said Mary A. Lockwood until she executed the above described deed to complainant. Mr. Lockwood's deposition is then taken at considerable length to show that he never exercised any acts of ownership over the land and that when he left Nebraska he abandoned the same.

It is not necessary to refer to this testimony any further than to direct the Court's attention to the fact that Wm. F. Lockwood, according to his own testimony, had deeded away his en-

tire interest in the land some three or four years before he left Nebraska, and that after he had made the deed, thus conveying his interest to Virtue, he never afterwards had, or acquired in any manner, any right, title or interest in and to said land. As to what particular effect his leaving the State and abandoning the land, as he testified he did, may have on this case, we are not able to discover. An examination of the deposition of Mary A. Lockwood, his wife, shows about the same state of affairs. She left Nebraska sometime in 1863, and says that she never paid any further attention to the land and had no intention of ever reclaiming it. An examination of her testimony will show that it is a parrot-like tale told by her. All the questions are so framed that they are answered by yes or no; but for the purposes of this case, we can safely admit to be true, all that she states in her testimony, and still it can have no effect whatever upon the decision of this case.

As we have already stated, where the legal title is said to exist in a person, it is immaterial whether or not that person abandons the land, and does not, for a series of years, no matter how many, pay any attention to it, yet he is not debarred from, at any time, reclaiming it, except there has been actual adverse possession taken by someone, and that possession has been continuous and notorious for the statutory period. The evidence taken on the original bill, and the findings of the Court on that bill, show conclusively that no one has ever been in actual possession of the land, and that consequently the statute of limitations has and can cut no figure in the case. *There could be no abandonment* on the part of parties holding the legal title :

Ferguson vs. Ferguson, 6th Neb. 383.
Florence vs. Hopkins, 46 N. Y., page 186.

In the case of the Mayor and Aldermen vs. Riddle, 25 Penn. St., 259, it is said : "Abandonment may take place with regard to an inchoate right, but is scarcely predicable of a perfect title ; and hence, payment of taxes in his own name, for even thirty

years, by a sheriff's vendee of a void title, who had made an entry on the land twenty-four years ago, and once or more every year since, and had run lines ; and who had a tenant on for nineteen, but not for twenty-one years, does not prove an abandonment, there being an absent owner of the lands by patent. The constructive possession follows the legal title."

To the same effect is Washburne on Real Property, 3d Ed. pages 60 to 66, inclusive, Tiedeman on Real Property, 559 to 562; Wardell on Abstracts, Sec. 16.

In note to Wyman vs. Hurlburt, 40th Am. Dec., on page 466, it is said: "It may be laid down as a general proposition, that the legal title to land, founded upon a grant, or prescription for such a length of time as to warrant the presumption of a grant, cannot be lost by mere abandonment, nor by any mere parol disclaimer, and the reason assigned for such rule is, that to hold otherwise would be contrary to the statute of frauds." Citing a number of cases.

The rule laid down by Washburn is: "It is probably not too strong a conclusion to state that he cannot lose his title to a free hold in the land by any act or oral declaration of abandonment, unless it comes within the category of estoppel, or is followed by such a possession by the person claiming title thereto, as brings the case within the statute of limitations.

See also the case of:

Gray vs. Jones, 14th Fed. Rep. 83, page 86.
Elmendorf vs. Taylor, 10th Wheat., 168.
Pindle vs. Muliken, 1st Black, 585.

In Williams vs. Conger, 49th Tex., 602, it is said: "We know of no authority to warrant the Court in holding that mere failure to pay taxes, or delay of the owner in bringing suit for the recovery of land, to which he has the legal title, will defeat his action, where there there has not been actual possession, for a sufficient length of time, to support the plea of limitation."

To the same effect are the cases of Challis vs. Cable, 632, and Berry vs. Harnage, 39 Texas, 638. In the latter case it is said: "Laches of the owner of the legal title in paying taxes will not defeat his action where there has not been actual adverse possession for a sufficient length of time to support the plea of the statute of limitations."

To the same effect is:

Montgomery vs. Noyes, 11 S. W. R., 138 and
Ormsby vs. Mining Co., 35th N. Y.
Murphy vs. Weldon, 58th Texas, 241.

The law is well laid down in the case of the inhabitants of School District No. 4 vs. Benson, et al., 31 Me., 351, reported in 52d Am. Dec. 618, on page 620, the Court says: "No doubt a disseizor may abandon the land or surrender his possession by parol to the disseizee at any time before his disseizment has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seizen, whether he holds adversely or in subordination to the legal title. But the title obtained by a disseizment so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment; it must be transferred by deed. One having such title may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may a person who holds an undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned, in a manner not legally binding upon them."

The fourth and last specification argued by the appellants is that of laches. Appellants argue this question of laches at considerable length, and certainly shows that they have exercised great industry in collecting the authorities on this proposition of law; but an examination of the authorities cited by them, shows that they are

applicable in cases in which the facts show that the parties went into possession of the disputed premises and either remained in the open, notorious and adverse possession of the same, for the full statutory period required by the statute of limitations to ripen the title; or where the property had passed into the possession of third and innocent parties, and they had made valuable and lasting improvements.

In the case at bar the facts show that none of these things exist; appellants' own testimony showing that they have never been in possession of the land; and the only acts of ownership ever exercised by them was to claim ownership by reason of the foreclosure proceedings in Dakota County, which were absolutely void, and the payment of taxes before and after these proceedings were had, and which has already been referred to in our argument, and the further fact that they for a long time have offered the land for sale, and we might say failed to make a sale, for the reason, undoubtedly, that they could confer no title on a purchaser.

The doctrine of stale demand can have no application as against one holding the legal title when involved by one claiming an equitable right.

Hovey vs. Cummings, 68th Texas, 599.

Defense of laches in asserting title to land can never be interposed by one whose claim to the land has never been united with the possession:

13th N. E, 249; 122 Ill., 406.
Perry on Trusts, sec. 141.
Owens vs. Crow, 62d Md., 491.
Doro vs. Jewitt, 18th N. H., 340.
Angell on Limitations, sec. 390.

Where no equities of innocent purchasers have intervened, nor has the first party made valuable improvements and changed

the condition of the land, the defense of laches cannot be set up as a defense.

Bauman vs. Kelly, 36th N. W., 333 Minn.

The doctrine of equity, which denies relief to parties guilty of laches, is restricted, as a general rule, to cases where third parties have, during the delay, acquired rights, or the opposite party has so changed his situation as that he would be prejudiced by allowing the negligent party to assert his claims.

Williams vs. Allison, 33d Iowa, 278.
Mohawk Bank vs. Atwater, 2d Paige Ch., 54.
Cunningham vs. Cassidy, 17th N. Y., 276 on 282.
Jackson vs. Newton, 18th Johns, 355.
Chambers vs. Cochrane, 18th Iowa, on 170.

The owner of unoccupied land is under no obligation to bring suit to quiet his title until some one assumes to take adverse possession, until then the owner may rely upon his title, whether it be legal or equitable, and the statute of limitations does not run against him. The bar depends entirely upon adverse possession.

Gray vs. Jones, 14th Fed. Rep., 83 on 86.
Elmendorf vs. Taylor, 10th Wheat., 168.
Pindell vs. Mulliken, 1st Black, 585.

The general proposition laid down as to the laches being a defense is good law; but the facts in the case at bar do not chime in and fit the authorities cited, and as we have said above, that the defense of laches, in asserting title to land, can never be interposed by one whose claim to the land has never been united with the possession. We do not think it necessary to extend the argument further; except to notice a few additional authorities on this point. In the case of Gray vs. Jones, 14th Fed. Rep., 83 on 86, the Circuit Judge in deciding the case says: "It is insisted that the complainants are barred by the statute of

limitations or by laches, and that the respondent is barred by the two years' limitation, provided by section 5057, of the Revised Statutes of the United States. Some of the patents were issued to Sweeney in 1859 and others in 1866. But the owner of unoccupied lands is under no obligation to bring suit to quiet his title until some one assumes to take adverse possession. Until then the owner may rely upon his title, whether it be legal or equitable. The law depends entirely upon adverse possession." To the same effect are the cases of Elmendorf vs. Taylor, 10th Wheat., 168, and Pindell vs. Mulliken, 1st Black, 585, cited above.

In the case of Williams vs. Conger, 49th Texas, 602, it is said: "We know of no authority to warrant the Court in holding that mere failure to pay taxes, or delay of the owner in bringing suit for the recovery of land to which he has a legal title, will defeat his action where there has not been actual possession for a sufficient length of time to support the plea of limitation." To the same effect are the cases of Challis vs. Cable, 632; Berry vs. Hornage, 39th Texas, 638. In the latter case it is said "Laches of the owner of the legal title, in suing and paying taxes, will not defeat his action where there has not been actual adverse possession for a sufficient time to support the plea of the Statute of Limitations. See also,

Montgomery vs. Noyes, 11th S. W. R. 138.
Ormsby vs. Mining Co., 56th N. Y. 623.
Williams vs. Conger, 49 Texas, 602.

In this last case there was a delay of thirty-seven years on the part of the legal owner to bring the action. In Murphy vs. Welden, 58th Texas, 241. The Court after saying that in 27th Texas, 351 and 51st Texas, 648, it was decided that laches cut out an equitable title." But on the other hand, in the present case, the defendant in error has a clear legal title to the land in suit, perfect on its face, and to such title the plea of stale demand

alone could not possibly constitute a defense. No conclusion adverse to the title of the true owner can be drawn from the fact that after his title is perfected he refrains for a long period of years to take corporeal possession of his land. His title in law draws to it possession, and this constructive possession remains with the holder of the fee until some hostile act, amounting in law to an act of "ouster," destroys this character of possession."

In the case at bar, when appellee received the legal title to the land and placed the same on record, as he did, he was then regarded in law as in possession of the land, and no proceedings based on a claim through the foreclosure proceedings had in the name of the dead man, in the Dakota County Court, except the entering into the actual manual possession of the land and holding it adversely for the full statutory period of ten years could in any manner affect his right to recover in this case.

The case of Sanders vs. Godding, 45th Iowa, 463, is another case in point. It is said there, "Possession of land taken without a valid title thereto, after a termination of occupancy by the owner, and a failure to pay the taxes thereon, will not estop him to subsequently assert his title when the possession has not been continued long enough to entitle the occupant to the protection of the state of limitations. In the latter case it will be seen that the facts are much stronger in favor of defendant than in the case at bar, as not only taxes were paid, but defendant had went into the possession and had been in possession at the time the action was brought, for nearly the full statutory period of ten years, and had also laid off the lands in town lots, and sold the same or a portion, and they and their grantees had paid taxes on the lots.

The same rule is laid down in the case of Philadephia vs. Biddel, 25th Penna. State 259; also in Burke vs. Cutler, 43d N. W. R., 204, and in the case of Gaines vs. New Orleans, 6th Wallace, 642, p. 716, the Supreme Court of the United States has laid down the same rule established by the other cases cited above; and we do not think it is necessary to further cite cases or argue

upon the foregoing propositions. However, it may be said by appellants that some of the propositions argued were not passed upon by the trial Court. This is true, but that, we think, will not prevent our raising them here. They were raised before that Court; evidence was introduced in that Court, in support of them, and they were fully argued there; and if that Court, for the decision of the case, did not deem it necessary to pass upon them, it in no way debars this Court from so doing, and much more so should this Court deem them valid, and those upon which the decision was made in the trial Court invalid.

No case, to our knowledge, has ever been reversed for the reason that the trial Court decided it on wrong grounds, when good grounds did exist, upon which the decision should have been based.

But there is still another reason which arose in the trial Court, upon which we think there can be no question but what the judgment must be affirmed.

On page 61 of abstract we find that at the May, 1890, term of the District Court, to-wit: On the 23d day of June, 1890, the case was, by order of the Court, referred to the clerk, to report the facts, and on the 28th day of June, 1890, the report of commissioner was filed, and same is found on 61 to 65, inclusive, of abstract; after finding the facts, in regard to giving of trust deed, amount, etc., the report in part is:

"No part of the note above referred to has ever been paid, and that on February 27th, 1876, Isaac Harter, the payee in said note, died, and that the defendants herein are the heirs-at-law of the said Isaac Harter. On the day after his death there was begun in the District Court of Dakota County a suit to foreclose the said west half of the northeast quarter of Section 33, Township 29, Range 9, east, the same being the land included in the trust deed made to Augustus Kountz above referred to; that in this suit the only defendants were William F. Lockwood and Mary

A. Lockwood, his wife, and Augustus Kountz; that this suit was brought in the name of the said Isaac Harter, the petition being filed one day after his death, and that service therein was had on the defendants by publication, the petition therein being verified by Herman Kountz, as the agent of the said Isaac Harter, the petition being so verified on February 21st, 1876, and was signed by Isaac Powers, Jr., the attorney for plaintiff, or more accurately for Isaac Harter before his death; that this suit of foreclosure was prosecuted to final decree in the name of Isaac Harter, notwithstanding his death before the petition being filed, and no steps were ever taken to have the proceedings carried on in the name of his representatives or heirs-at-law; that finally, a foreclosure being allowed, a sheriff's deed to the said land was made to and in the name of the said Isaac Harter, then dead, dated May 10th, 1877, and that the said sheriff's deed was caused to be recorded by some of the heirs of Isaac Harter on the 1st day of June, 1877.

That the said suit in foreclosure was brought to foreclose the entire west half of the northeast quarter of Section 33, etc.. and that at that time James W. Virtue, the grantor of plaintiff herein, had a legal record title to an nndivided half of the said land, but was not made a party to the said suit. The proceedings in the said foreclosure suit are attached to this report.

I find that the land in controversy is situated in Dakota County, Nebraska, and has never been in the manual possession of either the plaintiff or his grantors, or in any of the defendants, or in that of Isaac Harter, deceased; that it is and has been, ever since the said Isaac Harter received the said note and the said trust deed was made, open, unfenced, unimproved and wild land."

On the 1st day of July, the Court makes a finding, holding that the proceedings in the State Court are absolutely void, for the reason that the plaintiff in that case was dead before the proceed-

ings were commenced, and nothing was done in that case by the legal representative; also that the statute of limitations does not apply, and the case was again referred, to make certain calculations, and either party was allowed to take further proof, on certain points mentioned. See abstract, page 66.

On the 31st day of July, 1890, supplemental report was filed, (See pages 67, 68 and 69, abstract.) After this was done, appellee, having, during the pendency of the Court, become the owner of all the land covered by the trust deed, was granted leave to file the supplemental bill, set out in the abstract and statement of the case, and the additional proof referred to in the argument was taken, and at the May term, 1891, on the 24th day of June, 1891, the case was submitted for a final decision. This was nearly a year after the report, and supplemental report of the commissioner was filed, and nowhere in the abstract is there found any exceptions to the report of the commissioner. The only objections in the record being the granting of an appeal in open Court at the time the final judgment was rendered.

We submit that under this state of facts appellants have no standing in this Court, and the judgment of the trial Court must be affirmed. Equity rule 83 provides that the parties shall have one month from the filing of the report in which to file exceptions thereto, and upon a failure to do so the report shall stand confirmed, at the next rule day after the month has expired, and there being a finding in said report, that the plaintiff in the State Court was dead before the commencement of that action, and that no manual possession of the land had ever been had; no other decision than the one named could be arrived at and the same should stand, and it has also been shown in our argument that under the evidence the findings of the commissioner are sustained by the evidence.

The appellee has taken an appeal on the matter of allowing

interest at the rate of four per cent. a month from the maturity of the note. There was no exception taken to the report of the commissioner stating that the note bore interest at this rate, and we think none was necessary, for the reason that there is no dispute over this fact. The only question involved is: are they entitled, as a matter of law and equity, to recover at this rate?

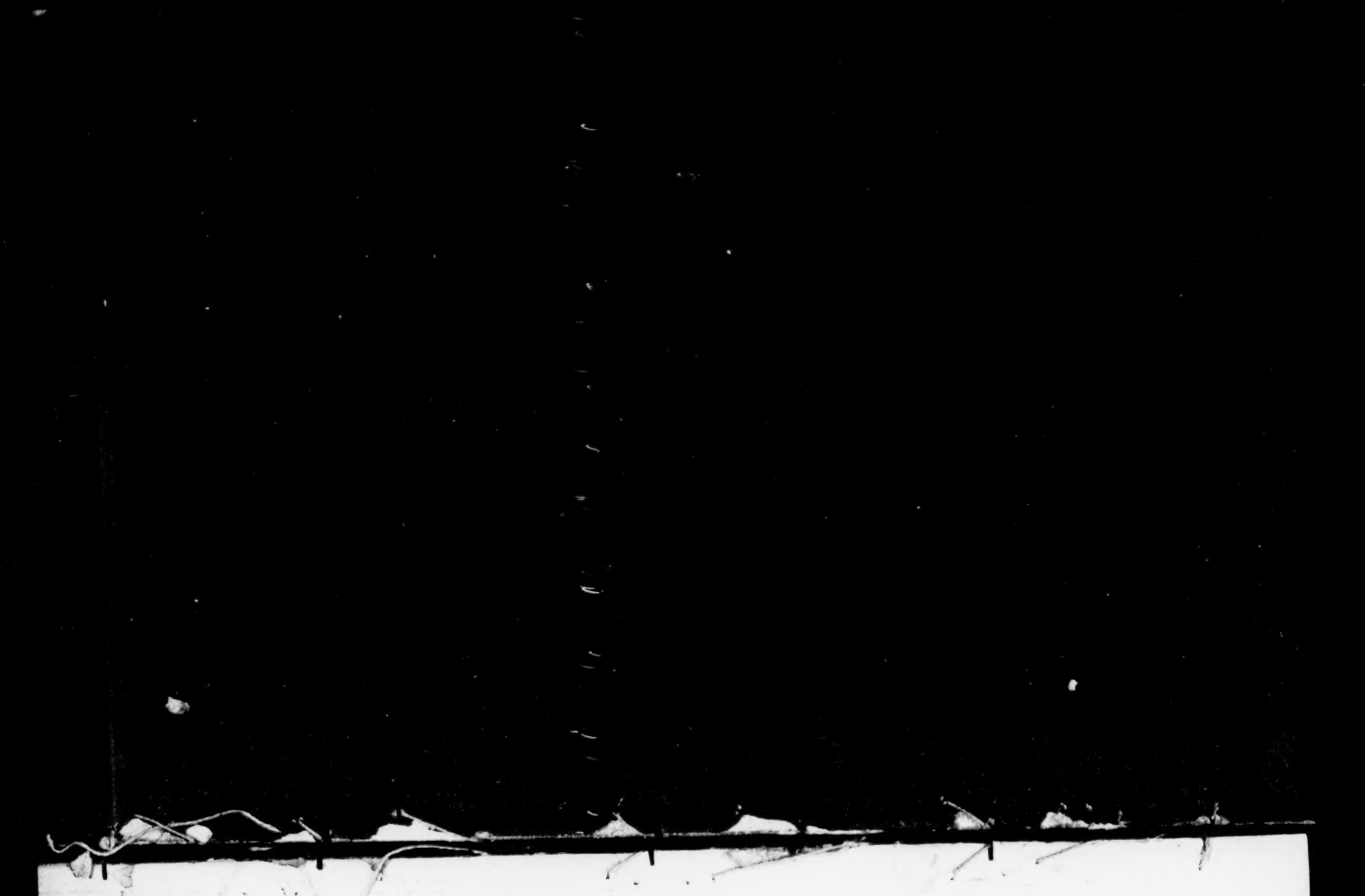
We have already noticed in the argument that the foreclosure of a mortgage or trust deed is an action *in rem*, and that the statute of limitations begins to run from the time of the maturity of the note secured. (See Nebraska cases above). This note matured one year after date and consequently the statute had run in 1869, this was some seven years before the attempt was made to foreclose in the State Court, but as the proceedings there were absolutely void, it could cut no figure; and as the action at bar is really one to redeem from any lien or claim on the land by reason of the trust deed; and appellants would only be entitled to receive anything back, on the theory that a party going into a Court of equity and asking equitable relief must himself do equity, and in this case this rule would be carried out to its fullest extent; when appellee was required to pay back to appellants the money actually laid out by them, with legal interest, which would not exceed seven per cent., from the time of the giving of the trust deed, and would amount to the sum of $492.80, instead of $2,313.00, the amount allowed by the trial Court. In this estimate of what we conceive to be the amount due, we have figured the interest up to the 27th of February, 1895, and that this is equitable and even more than they are entitled to is fully borne out by the evidence, which shows conclusively that these parties have simply been out what money they have paid for taxes assessed against the land, and the amount originally loaned, and by the other fact, that if appellee had simply went into possession of the land, without bringing an action, as he chose to do, appellants could have brought no action against him to properly foreclose the deed of trust, to which he could not have successfully interposed the

defense of the statute of limitations; nor could they, under the decisions cited above, have recovered back the taxes which they voluntarily paid, as under the decisions cited the one would have fallen with the other.

We think we have sufficiently reviewed the facts and law, and with this we submit the case.

W. E. GANTT,

Attorney for Appellee.



In the Supreme Court of the United States.

George D. Harter, M. D. Harter, Isaac Harter, Henry W. Harter, and Louise Ordean,
Appellants,

vs.

James P. Twohig,
Appellee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Brief of Appellants in reply to the Brief of Appellee.

I

COMMENTS ON APPELLEE'S STATEMENT OF CASE

Counsel for appellee in his brief excepts to the statement of the case made by the appellants in their brief heretofore filed in this cause in this court. This criticism of the counsel for appellee of the statement of the facts in the appellant's brief is not just. The statement of facts in appellant's original brief is a fair and a complete statement of the facts involved in this cause. The attempted statement of the case in the brief of the appellee is no statement of the case at all, but consists almost entirely of a transcript of the pleadings in the case which are already in the record.

The only alleged fact contained in the statement of the case in the brief of the appellee, so far as we have been able to discover, which is not contained in the statement of the

facts in the appellants' original brief, is, "that the deed made by the sheriff of Dakota county, * * * * * * * * * was made by the said sheriff without any order from the court confirming his proceedings in the sale of the said land, and ordering the deed to be made to the purchasers."

The claim of the appellee that the sale was not confirmed is absolutely false as appears upon page 46 of the record.

It is true that the record shows there was no journal entry but the court calendar of the District Court of Dakota County, Nebraska, under the date of April 10th, 1877, shows that the sale was confirmed by the court.

The absence of the journal entry simply confirms what counsel for appellants claimed in the original brief of the appellants in regard to the ease with which papers may be lost in a case after a long laspe of time, and the necessity for presuming the regularity of all judicial proceedings after the lapse of many years.

II

IRREGULARITIES.

The appellee makes much over some irregularities in regard to the publication and service in the cause in which the trust deed was foreclosed in Dakota county in 1876.

With due respect to the claim of the appellee we submit that after this long lapse of time such defects and irregularities cannot be taken advantage of. "When a court of record has entered judgment its jurisdiction over the defendant is presumed unless its record shows the contrary."

See Freeman on Void Judicial Sales, Sec. 8.

"If the record shows that the court acquired jurisdiction of the defendant, or even if it is silent on that subject, jurisdiction will always be presumed." Ib., Sec. 8.

Also on the subject of the effect of such irregularity see Bacon vs. Northwestern Mutual Life Insurance Company, 131 U. S., 258.

Learned vs. Foster, 117 Mass., 365.
Hamilton vs. Lubeikel, 51 Ill., 415.
Dempster vs. West, 69 Ill., 613.
Bush vs. Schenk, 88 Ill., 160.
McHarry vs. Sherman, 80 Ill., 357.
Hoyt vs. Pawtucket Institution for Savings, 110 Ill., 390.
Irish vs. Antioch College, 126 Ill., 474.

III

ARGUMENT.

In replying to the brief of the appellee we shall as far as practicable, for the purpose of convenience and logical arrangement, pursue the subjects for discussion in the order in which they were presented in the original brief of the appellants herein, viz.:

1. Statute of Limitations.
2. Abandonment.
3. Adverse Possession.
4. Laches.

1. The Statute of Limitations:

Counsel for the appellee throughout the brief filed herein by him, loses sight of the fact,

First, that the appellee went into a court of equity in the court below to set aside a decree of the District Court of Dakota County, Nebraska, entered at the November term, 1876; and secondly, that this decree is regular upon its face and if there are any serious defects in the proceedings which cul-

minated in said decree, that they do not appear upon record.

So far as the record discloses the decree entered by said court at said time, against the Lockwood's is a perfectly valid decree. Under that decree the lands in controversy were sold and the deed put on record more than ten years before the bringing of this action to set aside said decree and sheriff's deed.

Whatever might be claimed is the effect of this decree and sale and sheriff's deed upon the undivided half of the land in controversy, which at that time stood in the name of J. W. Virtue, surely there can be no doubt that the statute of limitations now operates as a bar to the right of the Lockwoods or anyone claiming under them to commence an action in equity to affect the decree of the District Court of Dakota County, Nebraska, entered at its November term, 1876, and which decree upon its face, as shown by the Record of that Court, was a regular and valid decree in all respects. The only way in which this decree could be shown to be irregular would be by introducing testimony to show that a decree apparently good upon its face, is in fact bad. After the long lapse of time since the entry of this decree, no Court of Equity, considering the laches of the appellee and those under whom he claims, should allow this.

We claim, therefore, that the statute of limitations does operate as a bar to the right of the appellee, the plaintiff below, to have the said decree of the District Court of Dakota County, Nebraska, entered at its November term, 1876, and the sheriff's deed based thereon declared void. This position is strengthened by the fact that the Lockwoods, as shown by the Record, knew of the pendency of the suit in which the decree was entered.

2. Abandonment.

The substance of the argument in the appellee's brief upon the subject of abandonment against the claim of the appellants is,

First, that there can be no abandonment of a legal title by the holder thereof; and,

Secondly, that there can be no abandonment of the legal title by said holder thereof because such an abandonment would be a violation of the provisions of the Statute of Frauds.

It is claimed in the appellee's brief that the authorities cited by appellants upon the subject of abandonment will show that the party who abandoned the premises had only been in possession under a claim of title and that in none of the cases so cited is it shown that the question of adandonment was passed upon against the party holding the legal title.

This is not true. The case of Judson vs. Morrow, 40 Cal., p. 300, is a case wherein a title held by deed was abandoned.

It has been held in the following cases that the legal title may be abandoned under the circumstances presented in those cases. See

Farrar vs. Farrar, 4 N. H., 191.
Commonwealth vs. Dudley, 10 Mass., 403.
Holbrooke vs. Tirrell, 9 Pickering, 105.

In Holmes vs. Railroad, etc., a case in the Ohio Circuit of the United States Court, McLain, Judge, said:

"It is a well known principle of law that every owner of property whether personal or real, may abandon it.

In Corning vs. Gould, it is observed that a man shall be held to intend what necessarily results from his own acts.

Consequently when property is abandoned under such circumstances as to leave no doubt of the fact, any one who has taken possession of it can not be required to relinquish it. Whether there be an abandonment is a question of fact to be determined by the circumstances of the case, and when this is done the right is extinguished."

The case of Corning vs. Gould, referred to in the above opinion of McLain, Judge, is found in the 16th of Wendall 543.

The claim of the appellee that there can be no abandonment of the legel title is not sound; nor is his claim that there are no authorities to that effect, true.

We come now to the consideration of the claim of the appellee that there can be no abandonment of real estate because such abandonment would be a violation of the provisions of the Statute of Frauds. This position is also untenable for the reason that it must be conceded that the weight of the authorities is to the effect that an incorporeal hereditament or easement which lies only in grant may be abandoned. See

King vs. Murphy, 140 Mass., 254.
Pope vs. Devereux, 5 Gray, Mass., 409.
Jamaica Pond Acqueduct Co. vs. Chandler, 121 Mass., 3.
Canny vs. Andrews, 123, 3 Mass., 155.

In Brown on the Statute of Frauds, 4th Edition, Sec. 232, it is said:

"An easement in the land of another is by common law grantable only by deed and of course no verbal agreement which amounts to conferring an easement or a right in the nature of one can be as such available to either of the parties to it."

The law on this point is too well settled to require any detailed citation of authorities.

In Massachusetts it has been held "that a claim of a right to enter upon the land of another to repair a dam and embankment necessary to the working of a mill and originally erected with the consent of the owner of the soil, cannot be maintained but by showing grant or prescription. See

Cook vs. Stearns, 11 Mass., 534.

Parker, Chief Justice, in the opinion in the above case, says: "Now this is an interest in land which cannot by our statute pass without deed or writing." Thus we see that the claim that land or real estate cannot be abandoned because of the Statute of Frauds, is unfounded. The statute forbids the conveyance of "lands, tenements or hereditaments or any interest in or concerning them except by deed or note in writing signed by the party so assigning or granting the same."

The authorities are unanimous upon the proposition that an easement or hereditament which is covered by this statute may be abandoned. If this is true, why on principle and analogy may not the title to the land itself be abandoned where the act of leaving the land combines with the intent and purpose of the owner of the legal title when he leaves the land to abandon and renounce it. We affirm, therefore, the position taken in the original brief and submit "that where abandoment includes both the intention to abandon and the external act by which the intention is carried into effect" that there is an abandonment of the real estate and legal title. Of course, much depends where a party seeks to rely upon an abandonment of the legal title, upon the facts surrounding the case. In the case at bar Mrs. Lockwood

abandoned the land in controversy with the intention of renouncing it and so says in her testimony; and the record shows as plainly that Virtue abandoned the land with the intention of renouncing it, as he placed other lands and real estate in the hands of his agents to look after the same for him when he left Dakota County, Nebraska, and went to Oregon.

When these parties abandoned the land, having failed to pay the taxes thereon for years, before the abandonment and never having paid the same since, the land was encumbered for more than it was worth, as the record shows, and this was undoubtedly the reason why it was abandoned by both Virtue and Mrs. Lockwood. It would be a violation of the plainest principles of justice and right to now permit the grantee of Virtue and Mrs. Lockwood, who acquired their equities of redemption for a mere trifle and as a matter of speculation, after more than twice the period of limitations under the Nebraska statute had run since the abandonment of the land by Virtue and Mrs. Lockwood, and after the same without any efforts or expenditures of either the appellee or James W. Virtue or Mrs. Lockwood, had increased greatly in value, to recover the lands from these appellants. For the foregoing reasons we think the defense of abandonment a good one against Virtue and Mrs. Lockwood and their grantee, under the facts and circumstances of this case, even assuming that said Virtue and Mrs. Lockwood had the legal title. As a matter of fact, however, we claim that neither Mrs. Lockwood nor James W. Virtue, the grantors of the appellee ever had the legal title to the land in controversy.

On the 27th day of February, 1858, Eugene L. Wilbur, transferred the legal title of all the land in controversy to Augustus Kountze to secure money loaned that day by Isaac

Harter, the father of the appellants, to said Eugene L. Wilbur. From that time forward Eugene L. Wilbur had nothing but an equity of redemption in the land in controversy and when he conveyed his interest in the land to William F. Lockwood on the 2nd day of March, 1860, all that he conveyed to said lockwood was an equity of redemption in the premises. When William F. Lockwood on the 6th day of February, 1861, conveyed the land in controversy to James W. Virtue, and when Virtue conveyed an undivided half of said lands to Mary A. Lockwood on the 3rd day of February, 1863, the legal title did not pass to either of said grantees by said conveyances, but only the equity of redemption, so that instead of having the legal title to the land in controversy, the grantors of the appellee never had anything but an equity of redemption. This proposition we shall argue more fully under the head of laches, and for the sake of brevity will say no more about it here.

3. Adverse Possession.

The brief of the appellee does not attempt to answer the argument of appellants in their brief that in the case of wild or uncultivated lands situate in a new country adverse possession may be inferred from fewer facts than it could be inferred from in an older community where the lands in controversy were cultivated lands. The appellee in his brief does not answer the contention of the appellants that "the rule which requires actual corporeal possession or an exercise of acts of ownership in order to constitute an adverse possession is of necessity relaxed in the case of wild or uncultivated lands and lands remote from settlements."

Counsel for appellee in discussing the question of adverse

possession and the effect of the payment of taxes, does not even refer to the leading Nebraska case on this subject, (Horback vs. Miller, 4 Neb., 47,) although it was cited in the original brief of the appellants. Neither does he in any manner refer to the case of McKesson vs. Hartley, 22 Neb., 697, also cited in appellants' original brief, but instead of so doing cites some cases from other states to the effect that the payment of taxes is no evidence of adverse possession. The question here is not what the rule may be in some other state but what the rule in Nebraska is. In Horback vs. Miller, 4 Neb., 47, the Supreme Court of Nebraska has decided that taxation of land for a series of years to the person claiming, and the payment of taxes by him, are competent evidence tending to show ownership. To the same effect is Fair vs. Fessenden, 39 N. H., 268, where it is said, "taxation of the land to an individual for a long series of years and the payment of taxes by him are competent evidence tending to show ownership or at least a claim of ownership thereto in him."

Briefly recapitulated we have in this case the following facts showing the adverse possession of the land in controversy by the appellants.

In 1876, James W. Virtue and Mary A. Lockwood held each an equity of redemption in an undivided half of the lands in controversy. In that year Isaac Harter, the father of the appellants, placed the trust deed given upon said premises in the hands of his attorney for foreclosure, and Mary A. Lockwood who held an equity of redemption and Augustus Kountze the trustee, who held the legal title, were made parties defendant. Such proceedings were had that a decree ragular upon its face and good as against the world, so far as the Record shows, was entered in the case and the lands sold to Isaac

Harter. The attorney of Isaac Harter did not know of his decease before the beginning of the suit, nor did the appellants. The land for want of other bidders was bid in by the attorney of Isaac Harter, who did not know of his client's death, and the sale was confirmed and the deed ordered for the entire premises. This was turned over by the attorney of Isaac Harter to the appellants who were then residents of Ohio. After receiving said deed the appellants believing that their title to the land was perfect in all respects, placed the same upon record in the office of the County Clerk, Dakota County, Nebraska, on the 10th day of June, 1877. Since that time they have held themselves as the owners of the land, paid the taxes thereon and offered the same for sale, had correspondence in regard thereto with various parties, and exercised all the rights of property and dominion exercised by any one over the real estate in controversy from said time until the 21st day of December, 1888, when this action was begun by the appellee, James P. Twohig.

A title by adverse possession is founded upon the notoriety of the claim of the party who sets up adverse possession. The various acts of ownership by the appellants exercised over the land in controversy from the time they placed their deed on record up to the 21st day of December, 1888, and their claim of title to the said land became so notorious and well known that as one of the witnesses said, the land was generally known as the "Harter land." The knowledge of the claim of these appellants to be the owners of the land in controversy had become so general that although they lived in Ohio, the land was known throughout the community generally, as the "Harter land." Even a fence surrounding the property in controversy for the full statutory period might have given less notoriety to the claim of ownership by these

appellants of the land in controversy. Considering the fact that the various acts of ownership exercised by the appellants over the lands in controversy and their claim at all times to be the owners of said land published to the world the fact of their claim to ownership so thoroughly that the same became known as the "Harter land," we submit that the defense of adverse possession of the land in controversy is well taken.

4. Laches.

In the discussion of the question of laches we think that counsel for the appellee has given a less wide application to the doctrine of laches than the authorities warrant.

We think that the well recognized principle of equity that "there must be conscience, good faith and reasonable diligence to call into action the powers of a Court of Equity" means something. We think that this principle is a beneficent and a useful principle of equity jurisprudence, and that a Court of Equity will not hesitate to apply it in any proper case whether it be against the holders of legal or equitable estates. To hold anything else would be to deny the history and growth of equity itself.

We contend therefore, that the claim of counsel for the appellee, that the doctrine of laches cannot affect the legal title, is untenable and unsound. Of course, it is true that this principle is more generally applied to equitable estates because courts of equity have more to do with equitable estates than legal ones, but we submit that a court of equity in a case like the one at bar, ought not to hesitate to apply this just principle of equity to prevent the holder even of the legal title from doing an inequitable thing.

Counsel for the appellee seems to have staked everything in his argument upon the fact that the appellee has the

legal title to the lands in controversy. Even if he has the legal title to the lands in controversy we contend that the several defenses set up by the appellants (the defendants below) in the court below, are good even as against the legal title.

We think, however, that the appellee does not now hold and that neither he nor his grantors, Virtue and Mrs. Lockwood, ever held the legal title to the lands in controversy. All that they have or ever have had is a stale equity of redemption. On the 27th day of February, 1858, Eugene L. Wilbur entered the lands in controversy, paying therefor the sum of one dollar and twenty-five cents ($1.25) per acre, and upon the same day conveyed said lands to Augustus Kountze, trustee, by a trust deed duly executed and delivered to secure to one Isaac Harter, the father of the appellants, the payment of one hundred and forty dollars ($140) upon a promissory note due one year thereafter, which said promissory note was to bear interest at the rate of 4 per cent. per annum after maturity.

After making this trust deed, Eugene L. Wilbur no longer held the legal title to the lands in controversy, but simply the equity of redemption. This would be the case if it had been a simple mortgage and we think this would surely be the case with a trust deed.

In Jones on Mortgages, Sec. 62, it is said: "A deed of trust to secure a debt, is in legal effect a mortgage." The only difference of course, would be that in the one case the legal title goes to the mortgagee and in the other it goes to the trustee named in the trust deed. A trustee in a trust deed is the agent of both parties. See

Jones on Mortgages, Sec. 1771.

The only difference between a trust deed and a mortgage

so far as the legal title is concerned is this, that in a mortgage the legal title goes to the mortgagee and the equity of redemption remains in the mortgagor, and in a trust deed the legal title goes to the trustee with an equity of redemption in the grantor and an equity belonging to the person who loaned the money to have the trust deed foreclosed and the property sold upon default in the payment of money secured by the trust deed. In other words, in a trust deed the legal title is in the trustee and the grantor in the trust deed and the party who loans the money which is secured by the trust deed each have equities in the estate but neither has the legal title.

In most states, including Nebraska, the effect of a trust deed is that of a mortgage; that is to say, that it is necessary to foreclose the same in equity to shut off the equity of redemption of the grantor in a trust deed. We think that under the authorities there can be no doubt whatever that by the giving of a trust deed or mortgage the grantor or mortgagor parts with the legal title for the purpose of securing the debt and that thereafter there remains in him nothing but an equity of redemption. This is the rule wherever this order of descent or transfer of title of real estate has not been changed by statute.

Kent's Commentaries, Vol. 4, 13th Edition, Sec. 136, Lecture 18, defines a mortgage, as follows: "A mortgage is the conveyance of an estate by way of pledge for the security of the debt to become void on payment of it. The legal ownership is vested in the creditor but in equity the mortgagor remains the actual owner until he is debarred by his own default or by judicial decree."

In Coote on Mortgages, 139, the following definition of a mortgage is found:

"A mortgage is a debt by specialty secured by land of which the legal ownership is vested in the creditor, but of which in equity the debtor and those claiming under him remain the actual owners until debarred by legal, judicial sentence, by legislative enactment or by their own laches."

In Williams on Real Property, Sec. 424, we find the following: "From the date of the mortgage deed the legal estate in fee simple belongs not to the mortgagor but to the mortgagee."

In Jones on Chattel Mortgages, Sec. 11, (4th Edition,) that learned author says: "At common law the legal estate vested in the mortgagee and was forfeited upon default. Equity established the right of redemption after default. From these principles is derived the doctrine of mortgages as it exists at the present day in England and in a large part of our country. The legal title passed to the mortgagee by the deed, but the mortgagor has after default a right to redeem which he may enforce in equity. A mortgage is one thing at law and another thing in equity. In the one Court it is an estate and in the other a security only. The mortgagee has certain legal remedies and the mortgagor certain equitable remedies."

In Jones on ~~Chattel~~ Mortgages, Sec. 62, upon the subject of trust deed, it is said: "Such a deed has all the essential elements of a mortgage. It is a conveyance of land as security for a debt. It passes the legal title to the grantee just as a mortgage does except in those cases where the natural effect of a conveyance is controlled by statute."

There can be no doubt that at the common law, Eugene L. Wilbur on the 27th day of February, 1858, parted with the legal title to the land in controversy and that neither James W. Virtue nor Mrs. Lockwood after 1876, nor the appellee at

any time, possessed anything but a stale equity of redemption in the land in controversy. Did the common law prevail in the territory (not state) of Nebraska, on the 27th day of February, 1858? We think it did.

Chancellor Kent in the 4th Vol. of his Commentaries, Sec. 473, in speaking of the common law says: "It has been assumed by the Courts of justice or declared by statute with like modifications as the law of the land in every state. It was imported by our colonial ancestors as far as it was applicable, and so sanctioned by royal charters and colonial statutes. It is also the established doctrine that English statutes passed before the emigration of our ancestors and applicable to our situation and in amendment of the law constituted a part of the common law of this country."

So far as we have been able to ascertain, the rule of common law relating to trust deeds and mortgages by which the mortgagor or grantor in the trust deed parted with the legal title and only retained an equity of redemption, prevailed in the territory of Nebraska. So far as we know this principle of the common law was not modified by any act of the territorial legislature of Nebraska. Since the territory of Nebraska became a state, the legislature of the state of Nebraska has modified the rule by declaring that the legal estate does not pass to the mortgagee in a mortgage, to the trustee in a trust deed. This act of the legislature of the state of Nebraska, in derrogation of the common law would seem to indicate that before the passage of the act in question, that the common law rule by which the legal title to premises mortgaged passed to the mortgagee, and the legal title to property conveyed by trust deed passed to the trustee, prevailed in Nebraska. The rights of the parties were fixed by the common law before the passage of the statute.

We submit, therefore, that instead of the appellee holding the legal title to the premises in controversy in this law suit, that he is simply the owner of a stale equity obtained by him under such circumstances as not to appeal to the conscience of a court of equity.

The record shows further that the trustee, Augustus Kountze, was made a party to the proceedings to foreclose the trust deed begun in 1876 in the district court of Dakota County, Nebraska. This is the case in which the decree was entered against him and Mary A. Lockwood, and which the record shows to be a regular and indefeasible decree in all respects.

We have then in the case at bar, instead of the legal title on the one side of this controversy in the hands of James P. Twohig, the appellee, as claimed by him, and a mere equity upon the part of the appellants, two equities; that of these appellants and the stale equity of the appellee, James P. Twohig. Which of these is the better equity, and which ought to prevail? This is the real question in this law suit.

Counsel for the appellee seems to recognize that the position of his client is an unconscionable one, and so from the beginning to the end of his brief there is not a single syllable in defense of the indefensible conduct of the appellee in attempting to deprive the appellants of their property.

Counsel for the appellee does not claim anything for the "conscience, good faith and reasonable diligence" of his client, but contends that because the appellee has the legal title to the estate, that therefore he is entitled to the property in controversy without regard to any questions of "conscience, good faith and reasonable diligence." It turns out, however, upon investigation, that his client is not the holder of the legal title to the premises in controversy, and there-

fore has no standing whatever in this court upon that ground.

Upon the subject of laches we desire to cite in addition to the cases cited in the original brief of the appellants, the following leading cases upon that subject, viz.:

Halstead vs. Grinnen, 152 U. S., 412.
Hammond vs. Hopkins, 143 U. S., 224.
Felix vs. Patrick, 145 U. S., 317.
Foster vs. Mansfield, etc. Railroad, 146 U. S., 88.
Johnson vs. Standard Mining Co., 148 U. S., 360.

Let us now briefly summarize the facts in this case as shown by the record, and the finding of the master in the court below, to which facts the appellants ask the court to apply the doctrine of laches.

On the 27th day of February, 1858, Eugene L. Wilbur entered the west half of the north-east quarter of Section 33, township 29, in range 9, east 6 p. m., situate in Dakota County, in the then territory of Nebraska, paying therefor the sum of one dollar and twenty-five cents ($1.25) per acre. Upon the same day this land was conveyed by Eugene L. Wilbur, by a trust deed duly executed and delivered to Augustus Kountze, as a trustee to secure to Isaac Harter, the father of the appellants, the payment of one hundred and forty dollars ($140) upon a promissory note due one year thereafter, which said note was to bear interest at the rate of four per cent. per month after maturity.

This land was entered and on the same day it was mortgaged for more than it cost Wilbur. Wilbur never thereafter paid either any portion of the principal or interest upon the loan secured by the trust deed, and never paid any of the taxes. Thereafter on the 2nd day of March, 1860, Eugene L. Wilbur and wife quit-claimed the above de-

scribed property to one William F. Lockwood. On the 6th day of February, 1861, said Lockwood and wife conveyed said premises to James W. Virtue, one of the grantors of the appellee, and on the 3rd day of February, 1863, said Virtue conveyed an undivided half interest in the above described property to Mary A. Lockwood. Neither Wilbur, Lockwood, Virtue nor Mrs. Lockwood ever paid any principal or interest on the loan secured by the conveyance of said property in trust to Augustus Kountze, nor did they ever pay any of the taxes on said property. This was the situation of affairs up to the year 1876, when Isaac Harter placed the trust deed for foreclosure in the hands of his attorney, Isaac Powers.

On the 21st day of February, 1876, Herman Kountze, the agent of Isaac Harter, duly verified the petition to foreclose said trust deed. Isaac Harter died on the 27th day of February, 1876, and said petition was filed on the 28th day of February, 1876. There is nothing, however, in the record of the District Court of Dakota County, Neb., that goes to show the death of Isaac Harter. Such proceedings were thereafter had as to bring in William F. Lockwood, Mary A. Lockwood and the trustee, Augustus Kountze, as parties defendant by publication. Constructive service on all of said parties having been completed, thereafter at the June term, 1876, of said court, a decree of foreclosure was entered in favor of said Isaac Harter against William F. Lockwood and Mary A. Lockwood, his wife, and Augustus Kountze, the trustee. Under said decree the property in controversy was sold to Isaac Harter. The property was appraised at $880.00 before the same was sold at sheriff's sale. The amount of the claim of Isaac Harter at that time was Twelve Hundred and Forty-Eight Dollars ($1248.00). The attorney of Isaac Harter bid the property in for him because it would not sell for the amount

of the claim and the appellants were compelled to pay the costs in the case amounting to Sixty-Nine Dollars and Forty-Two Cents ($69.42.)

It is not true as claimed by the appellee, that there were no outside bidders for this land because of known defects in the proceedings, because said defects were *not* known until 1888, when Isaac Harter, one of the appellants filed an affidavit in the office of the clerk of the District Court of Dakota County, Nebraska, said J. P. Twohig then being clerk of said court—showing when his father, Isaac Harter, died.

Thereafter, on the 11th day of April, 1877, said sale was confirmed and a deed ordered and on the 10th day of May, 1877, in pursuance of said order of confirmnation a sheriff's deed for the property in controversy was executed and delivered to Isaac Powers the attorney for Isaac Harter, who delivered it to the appellants, who thereafter, on the 10th day of June, 1877, filed the same for record with the County Clerk of Dakota County, Nebraska, where the same was thereafter in its order duly recorded.

Isaac Harter was a resident of Canton, Ohio, the property was situated in Dakota County, Nebraska, the time was 1876, the place was not only distant from Canton, Ohio, but was difficult of access and communication therewith at that time was slow. The trust deed and notes were placed by Mr. Harter in the hands of his attorney in his life time at that then very distant place. Mr. Harter died February 27th, 1876. The petition to foreclose was filed February 28, 1876, only one day after his death. Mr. Harter's family was then young, distant, ignorant of their father's acts and did not know that the action to foreclose the trust deed had been commenced after his death until after the bringing of this action by James P. Twohig in the District Court of Dakota

County, Nebraska. Mr. Powers, the attorney, knew nothing of the death of his principal, and went on innocently and ignorantly with the proceedings to judgment execution, sale and deed. During all this time the owners of the property were silent, having indeed abandoned the place and the land. The estate of Mr. Harter paid the costs and expenses, still ignorant of any defect of title.

James P. Twohig, the appellee, (the petitioner below) in 1888, being the Clerk of the District Court of Dakota County, Nebraska, discovered, by comparison of the records in his office with an affidavit filed by Isaac Harter, the supposed defect in the title of the property in controversy, and in 1888-9, purchased the two halves thereof from parties holding stale equities, for a merely nominal sum, although the land was then worth large sums of money. After placing the sheriff's deed for the property in controversy on record. on the 10th day of June, 1877, more than 10 years before the bringing of this action by the appellee, which was brought after the full period required to bar an action for the recovery of real estate in Nebraska, had run, these appellants believing themselves to be the owners of said property, paid the taxes, and exercised all other rights of ownership. Had they known of any alleged defect in the title to their property they could have obtained quit-claim deeds from James W. Virtue and Mrs. Lockwood, who abandoned the land and really claimed no interest in it, for a merely nominal sum, but because of their ignorance upon this subject this was never done. The proceedings for foreclosure of the trust deed, the placing of sheriff's deed upon record, the payment of the taxes by the appellants, their attempts from time to time to sell the land, their claim of ownership and exercise of all control and dominion which was excerised by any one over the land during

the full period of limitation in Nebraska, had given such notoriety to the claim of title on the part of the appellants that the land became known as the "Harter land." During all these years when the appellants were paying the taxes up to 1887, the land continued of little value and could not have been sold for as much as was bid therefor at the sheriff's sale in 1877, and accrued interest. In the spring of 1887, a railroad bridge was built across the Missouri River in close proximity to this land, a town was laid out and the land rapidly rose in value until, as shown by the stipulation, it became worth Two Hundred Dollars ($200.00) an acre.

Lockwood and Mrs. Lockwood both knew of the proceedings to foreclose the trust deed. They left the land knowing that it was encumbered for more than it was worth, renouncing the same and never intending to again make any claim to said lands, as is shown by their testimony. And they never did make any claim thereto, but on the 20th day of November, 1890, for Fifty Dollars, ($50.00), quit-claimed their stale equity of redemption to the appellee, James P. Twohig. In 1864, James W. Virtue left Dakota County, Nebraska, knowing that this land was mortgaged for more than it was worth, without leaving anybody to take charge of the same, without ever looking after it in any way during this long period of years, and never paying any taxes thereon, although he left other lands and real estate in Dakota County, Nebraska, in the hands of an agent and paid taxes thereon. And so matters remained until shortly before the bringing of the action to vacate the decree of the District Court of Neb., entered June 5th, 1876, which action was brought by James P. Twohig, in the District Court of Nebraska, on the 21st day of December, A. D., 1888, and more than ten years after the sheriff's deed had been placed on file in Dakota County

Nebraska. Upon the above statement of facts whose equity should prevail?

The live equity of the appellants founded in good faith, in conscience, and in reasonable diligence, and which the father of the appellants sought to have merged in the legal title by the foreclosure proceedings in 1876, and which the appellants supposed had been successfully done until within a month or two of the time of the bringing of this action, or the stale, may we not say dead, equity of the appellee founded in delay, bad faith and misuse of official position?

We need not debate this matter further for it is clear that the real equity of this case and the law also are with the appellants, the heirs of Isaac Harter, and that the defects in the proceedings in Dakota County were incidental and in the then state of the country, impossible of discovery and correction.

The Record shows a valid decree in favor of Isaac Harter. Why, under the circumstances of this case, should any Court of Equity permit a person holding a stale equity, obtained under circumstances which even his own counsel does not defend, to show that by reason of a defect which does not appear of Record in the cause, that a decree of foreclosure, upon which all the parties have stood for so many years, was in fact invalid? On the part of the purchaser, Twohig, the bargain was catching and unconscionable and the information upon which the same was obtained was acquired through official relation which ought to have led to a communication with the appellants so that they might correct the defect, instead of a purchase upon the part of Twohig, which in its very nature was unconscionable and equivalent to a fraud in not disclosing the facts known to him.

It goes without saying, that had Twohig disclosed to Virtue

and Mrs. Lockwood the fact that they held as he supposed and now claims, the legal title to a valuable tract of land, that he could not have obtained deeds from them for their interest therein at a nominal sum. So that we submit the stale equity of the appellee is founded upon what is tantamount to a fraud, not only upon the appellees but also upon his grantors, of their stale equities of redemption. No right can be founded in a wrong. We therefore submit that no court of equity ought to give aid to the consummation of a transaction and scheme, which is in itself unconscionable, and we therefore submit that the Court should declare the equity of Twohig stale and of no force or validity whatever, against the superior, stronger and better equity of the appellants. We think that under the circumstances of this case the appellee would not be entitled to relief even if Virtue and Mrs. Lockwood held the legal title to the lands in controversy prior to the forclosure proceedings in 1876 in the District Court of Dakota County, Nebraska, and the placing of the sheriff's deed obtained as a result of these proceedings and the sale thereunder, upon record in the office of the County Clerk of Dakota County on the 10th of June, 1877. And it seems sure beyond controversy under the authorities, that if Virtue and Mrs. Lockwood held nothing but stale equities, as we think they did, that their grantee for a nominal consideration would have no standing whatever in a court of equity.

IV

INTEREST AND TAXES.

The appellee in his brief contends that if the Court should find in this proceeding that he is entitled to the relief claimed

by him in this action, that the court should go further and modify the decree of the Circuit Court of the United States for the District of Nebraska, by finding that the appellants are not entitled to the interest which that Court found they were entitled to upon the loan originally made by Isaac Harter to Eugene L. Wilbur, and that they are also not entitled to recover the taxes paid by them and said Isaac Harter upon the lands in controversy.

It seems to us that the appellee in making such a claim, stands in a very awkward position for a suitor in a court of equity. One of the maxims of equity is that "He who seeks equity must do equity." Another is that "He who comes into equity must come with clean hands."

The appellee desires that a decree in equity be declared void, and yet he is unwilling to abide by the contract made by and between Eugene L. Wilbur, through whom whatever rights the appelle may have come, and Isaac Harter in 1858.

There is no pretense or claim that the bargain made by and between Eugene L. Wilbur and Isaac Harter in 1858 was not a legal bargain and such as could have been enforced in any court of competent jurisdiction in the territory of Nebraska. In other words, the appellee asks this court that in the granting him a remedy in equity it shall break a valid contract between parties who were competent to make it. In such matters equity follows the law.

In regard to the taxes it would be indeed a singular exercise of equity jurisdiction if the title to the land in controversy was decreed by this court to be in James P. Twohig if it did not also decree that he should repay the taxes to these appellants, which Isaac Harter and these apellants have paid upon the land. Under no circumstances can a suitor in equity have equity done him unless he is willing

to do equity to others. Isaac Harter and the appellants for a long series of years paid the taxes upon the lands in controversy for the purpose of protecting their interests in the land.

In the first instance, Isaac Harter paid the taxes upon the land from 1858 to 1876 for the purpose of protecting his lien thereon as he undoubtedly had a right to do. Since that time the appellants have paid the taxes on the lands in controversy because they believed in good faith and had reason to believe that they held the legal title to the same. By reason of these payments of taxes by Isaac Harter in his life time, and the appellants since his death; the lands were not sold for taxes. No tax deed is now held by any person by reason thereof. But for these payments of taxes the lands in controversy would have been forfeited to the state many years ago and the appellee long since deprived finally of all rights therein. It seems to us to be such an ordinary exercise of equity jurisdiction that the appellee should under the circumstances, in case the decree is vacated by this Court, be held to discharge the contract of his privy in estate and to pay the taxes which in that event would have been paid for his benefit, that we will not further discuss this branch of the case.

For the reasons given in the original brief of the appellants, and for the reasons given herein, we think and submit that the appellee is not entitled to the relief prayed for in the petition, and that the several defenses of the appellants set up in their answer below, and now insisted upon in this court, viz., the statute of limitation, abandment, adverse possession, and laches, are established by the record and finding of facts in the case, and well taken, and that the

appellants are entitled to have the land in controversy, decreed to be their lands as against the stale and unconscionable claims of the appellee.

Respectfully submitted,

J. H. SWAN, AND
HENRY W. HARTER,
Of Counsel for the Appellants.